

9-16-2010

# Montalbano v. SARMC Clerk's Record Dckt. 37573

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IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

PAUL J. MONTALBANO, M.D.,

PLAINTIFF-APPELLANT,

VS.

SAINT ALPHONSUS REGIONAL MEDICAL  
CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

DEFENDANTS-RESPONDENTS.

*Appealed from the District Court of the Fourth Judicial  
District of the State of Idaho, in and for ADA County*

*Hon DEBORAH A. BAIL, District Judge*

RAYMOND D. POWERS

*Attorney for Appellant*

ROBERT B. WHITE

*Attorney for Respondent*

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Supreme Court Clerk of Appellate  
Entered on 9/6/00 By

37573

IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL J. MONTALBANO, M.D.,

Plaintiff-Appellant,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants-Respondents.

Supreme Court Case No. 37573

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE DEBORAH A. BAIL

RAYMOND D. POWERS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ROBERT B. WHITE

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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Date: 8/5/2010

th Judicial District Court - Ada County

User: CCLUNDMJ

Time: 09:45 AM

## ROA Report

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Paul J Montalblano MD vs. Saint Alphonsus Regional Medical Center, etal.

Paul J Montalblano MD vs. Saint Alphonsus Regional Medical Center, Christian George Zimmerman MD, Donald Fox MD, Sherry Parks

Date	Code	User		Judge
8/4/2009	NCOC	CCAMESLC	New Case Filed - Other Claims	Deborah Bail
	COMP	CCAMESLC	Complaint Filed	Deborah Bail
	SMFI	CCAMESLC	Summons Filed (3)	Deborah Bail
8/19/2009	AMEN	CCLATICJ	Amended Complaint and Demand for Jury Trial	Deborah Bail
	SMFI	CCLATICJ	Summons	Deborah Bail
	SMFI	CCLATICJ	(3) Another Summons	Deborah Bail
9/8/2009	ANSW	MCBIEHKJ	Answer (R White for St Als and D Fox)	Deborah Bail
	ANSW	MCBIEHKJ	Answer (R White for Sherry Parks)	Deborah Bail
9/9/2009	NOSV	CCBOYIDR	Notice Of Service	Deborah Bail
9/11/2009	HRSC	DCTHERTL	Hearing Scheduled (Scheduling Conference 11/04/2009 03:30 PM)	Deborah Bail
	NOTC	DCTHERTL	Notice of Status Conference (11/4/09 @ 3:30)	Deborah Bail
10/8/2009	NOAP	CCBOURPT	Notice Of Appearance (Andrew Brassey for Christian G Zimmerman)	Deborah Bail
10/9/2009	ANSW	MCBIEHKJ	Answer to Amended Complaint (Brassey for Zimmerman)...(changed date to accurately reflect the file stamp date on document)	Deborah Bail
11/4/2009	CONH	CCLUEDTC	Hearing result for Scheduling Conference held on 11/04/2009 03:30 PM: Conference Held	Deborah Bail
11/6/2009	HRSC	DCTHERTL	Hearing Scheduled (Jury Trial 06/07/2011 09:30 AM) 2-4 weeks	Deborah Bail
	NOTC	DCTHERTL	Notice of Trial Setting and Order Governing Further Proceedings (6/7/11 @ 9:30)	Deborah Bail
11/12/2009	MODQ	CCBOURPT	Motion To Disqualify Alternate Judge	Deborah Bail
11/13/2009	ORDR	DCTHERTL	Order Disqualifying Alternate Judge (McKee)	Deborah Bail
11/16/2009	MOTN	CCWRIGRM	Motion for Disqualification	Deborah Bail
11/17/2009	ORDR	DCTHERTL	Order for Disqualification (Higer)	Deborah Bail
11/24/2009	NOTC	CCNELSRF	Notice of Change of Firm Name	Deborah Bail
12/7/2009	NOTS	CCAMESLC	Notice Of Service	Deborah Bail
12/15/2009	NOTS	CCAMESLC	Notice Of Service	Deborah Bail
1/20/2010	MOTN	CCTOWNRD	Motion to Exceed Page Limit on Memorandum in Support of Motion to Compel	Deborah Bail
	MOTN	CCTOWNRD	Motion to Compel Production of Information Related to Wrongful Suspension	Deborah Bail
	MISC	CCTOWNRD	Appendix in Support of Motion	Deborah Bail
	MEMO	CCTOWNRD	Memorandum in Support of Motion	Deborah Bail
	NOHG	CCTOWNRD	Notice Of Hearing	Deborah Bail
	STIP	CCTOWNRD	Stipulation for Scheduling and Planning	Deborah Bail
	HRSC	CCTOWNRD	Hearing Scheduled (Motion to Compel 02/17/2010 02:00 PM)	Deborah Bail

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Date: 8/5/2010

North Judicial District Court - Ada County

User: CCLUNDMJ

Time: 09:45 AM

ROA Report

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Case: CV-OC-2009-14805 Current Judge: Deborah Bail

Paul J Montalbano MD vs. Saint Alphonsus Regional Medical Center, etal.

Paul J Montalbano MD vs. Saint Alphonsus Regional Medical Center, Christian George Zimmerman MD, Donald Fox MD, Sherry Parks

Date	Code	User		Judge
1/27/2010	ORDR	DCTHERTL	Order Granting Plaintiff's Motion to Exceed Page Limit on his Memorandum in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges	Deborah Bail
2/3/2010	MOTN	CCTOWNRD	Defendant Saint Alphonsus, Dr. Fox, and Park's Motion for Protective Order and Motion to Strike	Deborah Bail
	MEMO	CCTOWNRD	Memorandum in Support of Motion	Deborah Bail
	NOHG	CCTOWNRD	Notice Of Hearing	Deborah Bail
	HRSC	CCTOWNRD	Hearing Scheduled (Motion 02/17/2010 02:00 PM) Motion for Protective order and Motion to Strike	Deborah Bail
2/4/2010	STIP	CCWRIGRM	Stipulation for Entry of Protective Order	Deborah Bail
2/5/2010	ORDR	DCTHERTL	Protective Order	Deborah Bail
2/9/2010	MOTN	CCAMESLC	Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr Montalbano's Privileges	Deborah Bail
	AFSM	CCAMESLC	Affidavit In Support Of Motion Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr Montalbano's Privileges	Deborah Bail
2/10/2010	MISC	CCMASTLW	Plaintiff's Opposition to Motion for Protective Order and Motion to Strike	Deborah Bail
	MEMO	CCWRIGRM	Defendant St Als, Dr Foxs and Parks Memorandum in Opposition to Plaintiffs Motion to Compel	Deborah Bail
2/12/2010	RPLY	CCWATSCL	Reply in Support of Plaintiff's Motion to Compel	Deborah Bail
	RPLY	CCWRIGRM	Defendants St Alphonsus, Dr Fox, and Parks Reply in Support of Motion for Protection Order and Motion to Strike	Deborah Bail
2/17/2010	DCHH	CCLUEDTC	Hearing result for Motion to Compel held on 02/17/2010 02:00 PM: District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: 50	Deborah Bail
	DCHH	CCLUEDTC	Hearing result for Motion held on 02/17/2010 02:00 PM: District Court Hearing Held Court Reporter: Susan Gambee Number of Transcript Pages for this hearing estimated: Motion for Protective order and Motion to Strike 50	Deborah Bail
2/25/2010	ORDR	DCTHERTL	Order Re: Motion to Compel and Protective Order	Deborah Bail
3/3/2010	MOTN	CCMASTLW	Motion for Permissive Appeal	Deborah Bail
	MEMO	CCMASTLW	Memorandum in Support	Deborah Bail
	NOHG	CCMASTLW	Notice Of Hearing	Deborah Bail
	HRSC	CCMASTLW	Hearing Scheduled (Motion 03/17/2010 03:30 PM) Mo/Permissive Appeal	Deborah Bail

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Date: 8/5/2010

10th Judicial District Court - Ada County

User: CCLUNDMJ

Time: 09:45 AM

ROA Report

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Case: CV-OC-2009-14805 Current Judge: Deborah Bail

Paul J Montalblano MD vs. Saint Alphonsus Regional Medical Center, etal.

Paul J Montalblano MD vs. Saint Alphonsus Regional Medical Center, Christian George Zimmerman MD, Donald Fox MD, Sherry Parks

Date	Code	User		Judge
3/10/2010	OPPO	CCWRIGRM	Defendants St Alphonsus, Dr Foxs and Parks Opposition to Plaintiffs Motion for Permissive Appeal	Deborah Bail
3/15/2010	RPLY	CCSULLJA	Reply in Support of Plaintiff's Motion for Permissive Appeal	Deborah Bail
3/16/2010	MISC	CCMASTLW	Joinder in Opposition to Motion for Permissive Appeal	Deborah Bail
3/17/2010	DCHH	CCLUEDTC	Hearing result for Motion held on 03/17/2010 03:30 PM: District Court Hearing Held Court Reporter: Susan Gambiae Number of Transcript Pages for this hearing estimated: Mo/Permissive Appeal 50	Deborah Bail
3/24/2010	ORDR	DCTHERTL	Order Granting Plaintiff's Motion for Permissive Appeal	Deborah Bail
	MOTN	CCWRIGRM	Plaintiffs Motion to Stay District Court Processing of Motion for Permissive Appeal	Deborah Bail
	MEMO	CCWRIGRM	Memorandum in Support of Plaintiffs Motion	Deborah Bail
	NOTH	CCWRIGRM	Notice Of Hearing (05/12/10 @ 2:30pm)	Deborah Bail
4/5/2010	STIP	CCNELSRF	Stipulation to Stay District Court Proceedings During Processing of Motion for Permissive Appeal	Deborah Bail
4/6/2010	ORDR	DCTHERTL	Order to Stay District Court Proceedings During Processing of Motion for Permissive Appeal	Deborah Bail
	STAT	DCTHERTL	STATUS CHANGED: inactive	Deborah Bail
6/4/2010	APSC	CCHOLMEE	Appealed To The Supreme Court	Deborah Bail
6/18/2010	REQU	CCSWEECE	Defendant's Request For Add'l Records To Be Included In The Clerk's Record on Appeal and/or Transcript on Appeal	Deborah Bail

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ORIGINAL

NO. \_\_\_\_\_ FILED 404  
DATE \_\_\_\_\_ PM  
AUG 04 2009  
J. DAVID NAVARRO, Clerk  
CLERK OF DISTRICT COURT  
BOISE, IDAHO

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; CHRISTIAN G.  
ZIMMERMAN, M.D.; and DONALD  
FOX, M.D.,

Defendants.

Case No. **CV 00 0914805**

**COMPLAINT AND DEMAND FOR  
JURY TRIAL**

COMES NOW, Plaintiff PAUL J. MONTALBANO, M.D., by and through his attorneys of record, POWERS THOMSON, P.C., and hereby alleges the following as and for claims against Defendants in the above-captioned litigation.

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## **JURISDICTION & PARTIES**

1. Plaintiff Paul J. Montalbano, M.D. (Dr. Montalbano) is an Idaho resident and neurosurgeon surgeon, specializing in spine surgery, licensed and practicing medicine in the State of Idaho.

2. Saint Alphonsus Regional Medical Center (SARMC) is a non-profit corporation conducting business and providing medical services to the general public in the state of Idaho.

3. Christian G. Zimmerman, M.D. (Dr. Zimmerman) is an Idaho resident licensed and practicing medicine in the State of Idaho. Dr. Zimmerman is a neurosurgeon whose specialty includes the practice of spine surgery. Dr. Zimmerman is affiliated with the Spine Medicine Institute and is employed by SARMC.

4. Donald Fox, M.D. (Dr. Fox) is an Idaho resident licensed and practicing medicine in the State of Idaho. Dr. Fox's specialty is anesthesia. Dr. Fox served as President of the SARMC Medical Staff during the relevant time periods involved in this lawsuit and is compensated by SARMC through a written agreement.

5. Jurisdiction and venue are proper in this Court under Idaho Code §5-404. The amount in controversy exceeds the jurisdictional threshold of this Court.

## **FACTS**

6. Dr. Montalbano applied for and was granted medical staff privileges at SARMC in 2000. Since that time and until January 14, 2009, Dr. Montalbano's privileges were renewed at SARMC on a regular basis. Each time Dr. Montalbano's privileges were renewed, SARMC presented him with a new set of Bylaws and Medical Staff Policies and Plans ("MSPP").

7. In 2006, the Spine Medicine Institute ("SMI") was conceived and created by SARMC. It was at the time and remains the vision of SMI at SARMC to be the destination spine care program for the Northwest. SMI offers multidisciplinary management of back and neck

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pain, including medical evaluation, diagnostic imaging, pain management, physical therapy, spine surgery, psychosocial care. SMI competes directly with the services offered by Dr. Montalbano.

8. Dr. Montalbano, SARMC, and SARMC's agents agreed to act and deal with one another in a consistent fashion by virtue of the Bylaws and MSPP. By virtue of their respective conduct and actions, SARMC and Dr. Montalbano entered into a fiduciary relationship pursuant to SARMC's MSPP and Bylaws as a result of Dr. Montalbano being granted renewed privileges and continuously practicing medicine at SARMC.

9. The actions and conduct of SARMC and Dr. Montalbano established duties and responsibilities between SARMC and Dr. Montalbano wherein both parties held reasonable expectations that each would act in good faith in fulfilling their respective responsibilities set forth in the SARMC MSPP and Bylaws.

10. Under Chapter X, Section 4 of the MSPP, complaints alleging disruptive conduct concerning a practitioner should be reported in SARMC's Qstatim reporting system.

11. On April 1, 2008, Sherry Parks (Parks) filed a Qstatim report against Dr. Montalbano to report alleged disruptive behavior regarding an incident involving a patient (Patient X) on March 31, 2008.

12. The SARMC Bylaws provide that Qstatim reports will be forwarded to the Event Report Triage Committee to review the information contained in Qstatim reports and determine whether the reports have merit and should be addressed further by other committees.

13. The Qstatim triage committee reviewed the Qstatim report filed by Parks and referred it to the Physician Professional Practice Committee (PPPC) for evaluation upon determining that the report warranted further review.

14. Both the triage committee and the PPPC negligently accepted Parks' version of

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the facts as reported in her Qstatim report as true statements and relied upon said information, without determining whether the allegations were true and accurate and could be corroborated by others involved in the matter.

15. Based upon its failure to properly evaluate the Qstatim report, the PPPC recommended to the Medical Executive Committee (MEC) that the MEC appoint an ad hoc committee to further investigate Parks' Qstatim report, pursuant to the Corrective Action Plan of the Bylaws.

16. On April 28, 2008, the MEC voted to appoint a three-person panel of physicians to serve as the Ad Hoc Committee. The MEC directed the Ad Hoc Committee to investigate Parks' Qstatim report and make a recommendation. The Ad Hoc Committee conducted interviews with hospital staff who were either directly or indirectly involved, including Sherry Parks, who did not communicate with Dr. Montalbano but who filed the Qstatim report, and Jeannie Parker, who had the direct communication with Dr. Montalbano. Through the information presented by the witnesses, the Ad Hoc Committee should have known that the Parks' Qstatim report was not credible, that Parks' testimony was not be corroborated by other witnesses, and that the report contained false statements, false accusations, and misrepresented the facts.

17. The Ad Hoc Committee failed to execute its investigative authority and conduct an independent, objective investigation when it relied upon the preconceived notion that Parks' Qstatim report had merit and the information in the report was true.

18. In the spring of 2008, Dr. Fox, as President of the Medical Staff, disclosed to Dr. Zimmerman confidential information regarding the investigation and the deliberations taking place regarding the Ad Hoc Committee's review of the allegations against Dr. Montalbano and, in doing so, breached his responsibilities as President of the Medical Staff and the hospital's

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confidentiality policy as outlined in Article I, Section 7 of the Bylaws and Article VII, Section 3 of the Bylaws.

19. Dr. Zimmerman breached SARMC's confidentiality policy and disruptive conduct policy when he chose to share with other individuals employed by and affiliated with the hospital the information he had learned from Dr. Fox.

20. By letter of June 24, 2008, Dr. Montalbano notified SARMC of his knowledge of this breach of confidentiality by Dr. Zimmerman and requested an investigation into Dr. Zimmerman's conduct.

21. Dr. Fox responded to Dr. Montalbano's letter without addressing Dr. Montalbano's substantive concerns. Subsequently, Dr. Fox admitted under oath not conducting a legitimate investigation of Dr. Montalbano's concerns.

22. Through a letter dated August 6, 2008, Dr. Montalbano notified the MEC and the PPPC of his dissatisfaction with the response to his confidentiality concerns and the failure to conduct a bona fide investigation of his concerns. Dr. Montalbano put the MEC and SARMC on notice through this letter that Dr. Fox was the person who divulged the confidential information to Dr. Zimmerman. No substantive response was provided by the MEC or PPPC.

23. The Ad Hoc Committee conducted interviews of Jeannie Parker and Sherry Parks on June 24, 2008. Based on these two interviews, the Ad Hoc Committee was made aware that Parks' Qstatim report contained false allegations and was not credible.

24. In August of 2008, the Ad Hoc Committee, accepting the Parks' Qstatim report as true, erroneously concluded that Dr. Montalbano violated the Conduct Policy and recommended a 90-day suspension to be withheld pending Dr. Montalbano's exercise of his fair hearing rights as required under the SARMC MSPP.

25. On August 25, 2008, the MEC voted to approve the Ad Hoc Committee's

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recommendation of a 90-day suspension. Dr. Fox and the Ad Hoc Committee withheld relevant information from the MEC in presenting the recommendation of the Ad Hoc Committee. The basis for the MEC's recommendation was information contained in the Parks' Qstatim report that SARMC, Dr. Fox, and the Ad Hoc Committee knew contained false statements, false accusations, misrepresented the facts, and had been filed by a person they knew did not have any direct contact or communication at all with Dr. Montalbano. Dr. Fox and members of the Ad Hoc Committee did not inform members of the MEC that Jeannie Parker's testimony rendered Parks' Qstatim report not credible.

26. After the MEC approved the Ad Hoc Committee recommendation, Dr. Zimmerman was informed of the decision as a result of breach of confidentiality and again disclosed and made public the confidential information related to the recommendation in violation of SARMC's MSPP.

27. Dr. Zimmerman has continued to disclose confidential information to the public in violation of SARMC's MSPP.

28. Throughout the course of conduct alleged, Dr. Zimmerman was not a member of the MEC, the Ad Hoc Committee investigating Dr. Montalbano, or a member of any professional review body responsible for investigating the allegations of disruptive behavior against Dr. Montalbano.

29. Dr. Montalbano exercised his right to a Fair Hearing in a timely manner under Chapter XII of the MSPP.

30. On December 2, 2008, Dr. Montalbano filed a formal Qstatim report against Dr. Zimmerman for his continued breaches of confidentiality from June 2008 through December 2008 as alleged above.

31. On December 2, 2008, Dr. Montalbano also filed a formal Qstatim report against

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Dr. Fox for disparaging comments Dr. Fox made against Dr. Montalbano while providing anesthesia services at SARMC.

32. On December 18, 2008, Dr. Kevin Clifford, chairman of the PPPC, issued an unfounded precautionary suspension of privileges upon Dr. Montalbano while the MEC further investigated the Qstatim reports he had filed against Drs. Fox and Zimmerman. This suspension violated the terms of the MSPP.

33. Five days later, on December 23, 2008, the MEC determined the precautionary suspension violated the terms of the MSPP and reinstated Dr. Montalbano's privileges pending an investigation of the Qstatim reports filed by Dr. Montalbano.

34. In a follow up letter to Dr. Montalbano dated December 30, 2008, Dr. Clifford claimed that the unfounded, precautionary suspension had nothing to do with Dr. Montalbano's clinical skills or surgical expertise but was related to disruption with a potential to affect patient safety.

35. The MEC negligently and in violation of the MSPP voted to re-commission the same Ad Hoc Committee that had previously investigated the Parks' Qstatim report against Dr. Montalbano and charged the same Ad Hoc Committee with the responsibility of investigating Dr. Montalbano's Qstatim reports regarding Drs. Fox and Zimmerman.

36. On January 5, 2009, the Ad Hoc Committee met to review the circumstances of Dr. Montalbano's Qstatim reports and was provided the same summary profile by the MEC that it had been provided during its investigation of the Parks' Qstatim report.

37. On January 14, 2009, after a cursory and incomplete investigation, the Ad Hoc Committee concluded that Dr. Montalbano's filing of the two Qstatim reports was retaliatory and not legitimate. In violation of the terms of the MSPP, the Ad Hoc Committee recommended that the precautionary suspension originally imposed on Dr. Montalbano be reinstated on January 14,

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2009, pending the final disposition of the ongoing hearing process relative to the Parks' Qstatim report.

38. Dr. Montalbano was not afforded due process through an opportunity for a fair hearing before his privileges were suspended on January 14, 2009, for an indefinite period of time in violation of the terms of the MSPP.

39. Dr. Montalbano's concerns about breaches of confidentiality and bias were not appropriately investigated. Instead Dr. Montalbano's Qstatim reports against Drs. Fox and Zimmerman were improperly directed to become part of the investigation involving the Parks' Qstatim report, even though Dr. Montalbano's reports did not involve Parks' Qstatim report or the incident involving Patient X.

40. The precautionary suspension of Dr. Montalbano's privileges imposed on January 14, 2009, was an inappropriate effort by SARMC and its agents to retaliate against Dr. Montalbano for challenging the veracity of the Park's Qstatim report and the recommendations flowing therefrom and for the filing of credible Qstatim reports against Drs. Fox and Zimmerman, who was at this time an employee of SARMC. Such retaliation is a violation of SARMC's policy against retaliation as outlined in the No Retaliation Policy, Chapter X, Section 9 of the MSPP. Furthermore, the effort by SARMC to "merge" two separate and independent investigations and actions into one process resulting in a suspension of privileges for an indefinite period of time without any due process rights violated the terms of the MSPP.

41. The decision to indefinitely suspend Dr. Montalbano's privileges on January 14, 2009, is an adverse action taken by a professional review body and took effect after the Ad Hoc Committee's incomplete investigation in January of 2009.

42. A hearing on the Parks' Qstatim report was held before the Fair Hearing Panel on February 16, 2009. At the hearing, the panelists heard the sworn testimony of Parks and Parker.

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It was through this testimony that SARMC, its agents and employees were again placed on notice that the sworn testimony of Jeannie Parker, the person who had direct contact with Dr. Montalbano, directly refuted Sherry Parks' testimony and the facts she alleged in her Qstatim report of April 1, 2008.

43. At this juncture, SARMC and its agents had an obligation to dismiss the Park's Qstatim report against Dr. Montalbano when it again became apparent that the report contained false statements, false accusations, misrepresentations of the facts, and was from an employee whose testimony was refuted and uncorroborated by other credible witnesses and the evidence. By failing to dismiss the Parks' Qstatim report, SARMC knowingly and recklessly furthered a process supported by false claims.

44. The Fair Hearing Panel upheld the 90-day suspension recommendation of the MEC on the Parks' Qstatim report. In doing so, the Fair Hearing Panel also noted that the Qstatim reports filed by Dr. Montalbano had been found to be retaliatory by the Ad Hoc Committee, once again violating the terms of the MSPP requiring that the Parks' Qstatim and Dr. Montalbano's Qstatim be investigated separately.

45. Defendants have intentionally, and with reckless disregard for the consequences, merged the Parks' Qstatim report and the separate and distinct Qstatim reports filed by Dr. Montalbano, resulting in a suspension, which took effect prior to the conclusion reached by the Fair Hearing Panel and without the right to a hearing.

46. Dr. Montalbano appealed the recommendation of the Fair Hearing Panel as provided for under Chapter XI, Section 20 of the MSPP. An appellate review panel was appointed and heard the matter on May 18, 2009. At the hearing, Dr. Montalbano again asked SARMC and its agents to recognize the false accusations in the Parks' Qstatim report and dismiss the matter. SARMC and its agents refused to do so.

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47. On June 10, 2009, the appellate review panel issued its recommendation consistent with the first Ad Hoc Committee recommendation that Dr. Montalbano be suspended for 90 days, which the Board of Trustees adopted as final on June 19, 2009. Despite reaching this conclusion, the appellate review panel conceded and affirmed that Ms. Parks' testimony was contradicted by the testimony of other witnesses and the accuracy of many of her statements regarding the conversation between Dr. Montalbano and Jeannie Parker was questionable.

48. By virtue of merging Dr. Montalbano's Qstatim reports and Parks' Qstatim report, Dr. Montalbano's privileges will have been suspended for a total of eight months, which is five months longer than the Ad Hoc Committee's recommended suspension for the Parks' Qstatim report. SARMC, through its agents, effectively imposed a suspension of five months upon Dr. Montalbano for a matter separate from the Parks' Qstatim report without any right to a hearing as required under the MSPP.

49. Together SARMC, its agents, employees and Board Members, Dr. Zimmerman and Dr. Fox conspired to damage Dr. Montalbano's professional reputation and his ability to practice spine surgery in Boise, Idaho. This effort continues on the date of the filing of this complaint.

### **FIRST CAUSE OF ACTION Civil Conspiracy**

50. Plaintiff herein adopts and incorporate by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

51. SARMC, Dr. Fox and Dr. Zimmerman, as well as with other unnamed co-conspirators, who include physicians and hospital staff employed by or who are agents of SARMC and SMI, conspired with malice and intent to injure Plaintiff's professional practice and reputation and;

(a) engaged in a pattern of conduct pursuant to which they improperly

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removed Dr. Montalbano from the SARMC medical staff in bad faith, thus preventing Dr. Montalbano from pursuing his livelihood and practicing his specialty in the hospital;

- (b) fabricated and exaggerated claims against Dr. Montalbano regarding his behavior, used discriminatory criteria in determining the validity of Qstatim reports filed by and against Dr. Montalbano, and acted in secrecy to further their personal and corporate interests rather than those of the patients of SARMC;
- (c) subverted the mandated SARMC corrective action plan process and SARMC's MSPP and Bylaws;
- (d) concealed the real anti-competitive motives for suspending Dr. Montalbano's medical staff privileges;
- (e) caused Dr. Montalbano's privileges to be suspended by SARMC by improperly influencing and manipulating SARMC Medical Executive Committee in bad faith; and
- (f) fabricated additional allegations against Dr. Montalbano during the pendency of and following the appeal process from his suspension of medical staff privileges at SARMC in an attempt to further alter the record and give credibility to their arbitrary actions.

52. Such conduct has harmed and will continue to harm in the future, consumers of orthopedic neck and back care in Southwestern Idaho.

53. The actions taken by Defendants SARMC, Dr. Fox and Dr. Zimmerman were intended to damage Dr. Montalbano's reputation, career and his ability to practice at SARMC while furthering the interests of SMI.

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54. As a direct and proximate result of the reckless, wrongful acts of Defendants, Plaintiff has been damaged in an amount to be proven at trial.

**SECOND CAUSE OF ACTION**  
**Breach of Covenant of**  
**Good Faith and Fair Dealing**

55. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

56. SARMC intentionally and recklessly failed to comply with its own Bylaws and MSPP when it did not dismiss the Parks' Qstatim report once it knew that the report contained false information, false accusations, and misrepresented the facts, thereby breaching its duty of good faith and fair dealing with Dr. Montalbano.

57. SARMC failed to comply with its own Bylaws and MSPP when it did not properly and fully investigate Dr. Montalbano's Qstatim reports, but instead classified them as being retaliatory which had the affect of merging them with the Parks' Qstatim report thereby breaching its duty of good faith and fair dealing with Dr. Montalbano in violation of the terms of the MSPP.

58. SARMC failed to comply with its own MSPP when it did not afford Dr. Montalbano with a fair hearing before it suspended his privileges indefinitely on January 14, 2009, under the false guise of a precautionary suspension.

59. SARMC failed to comply with the MSPP and inappropriately manipulated the MSPP for the purpose of impairing Dr. Montalbano's ability to practice at SARMC.

60. As a result of SARMC's failure to comply with the MSPP and Bylaws, SARMC unjustly and without good cause suspended Dr. Montalbano's privileges for 90 days based on a Qstatim report that the SARMC knew and conceded contained false statements, false accusations, and misrepresented the facts involving Patient X.

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61. Dr. Fox breached the covenant of good faith and fair dealing when he disclosed confidential information to Dr. Zimmerman regarding the status of the Ad Hoc Committee investigation.

62. As a result of SARMC's failure to comply with the MSPP and Bylaws, SARMC unjustly and without good cause indefinitely suspended Dr. Montalbano's privileges on January 14, 2009, after its investigation, under the false guise of a precautionary suspension.

63. SARMC and Dr. Fox breached the covenant of good faith and fair dealing when they did not dismiss the Parks' Qstatim report when they knew the report was based on false statements, false accusations, and misrepresented the facts involving Patient X.

64. SARMC and Dr. Fox breached the covenant of good faith and fair dealing when they suspended Dr. Montalbano's privileges on January 14, 2009, after investigating the Qstatim reports that Dr. Montalbano had filed, without affording him his due process rights to a fair hearing prior to the indefinite suspension.

65. Defendants SARMC and Dr. Fox breached the covenant of good faith and fair dealing by conspiring to present information in a biased fashion, omitting important facts and presenting erroneous facts in the presence of the MEC in order to manipulate the vote of the MEC.

66. Defendants SARMC and Dr. Fox breached the covenant of good faith and fair dealing by failing to discharge their responsibilities as outlined in the MSPP and as required by the Health Care Quality Improvement Act of 1986 (HCQIA).

67. As a direct and proximate result of Defendants SARMC's and Dr. Fox's actions, Plaintiff has been damaged and is entitled to be compensated for those damages in an amount to be determined at trial.

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**THIRD CAUSE OF ACTION**  
**Intentional and/or Negligent**  
**Interference with Economic Advantage**

68. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

69. Dr. Montalbano has been a member of the Boise medical community for nine years and has established a wide patient base throughout Southern Idaho and is affiliated with a number of medical institutions and medical insurance companies doing business in the community. Dr. Montalbano has invested substantial sums of money to establish continuing treatment relationships with patients, members of the medical community, colleagues, insurance companies and institutions in the community.

70. Defendants knew or should have known about the relationships established between Dr. Montalbano, his patients, physicians, and other institutions in the medical community.

71. SARMC's "double" suspension of Dr. Montalbano's privileges, despite its knowledge of the falsity of the Qstatim report and the improper merger of Dr. Montalbano's Qstatim reports with Parks' Qstatim report, was an intentional and reckless attempt to harm and undermine Dr. Montalbano's professional practice. SARMC's conduct amounts to dishonest, reckless, improper, and unfair acts to affirmatively damage Dr. Montalbano's reputation.

72. The reckless interference by Defendants with Dr. Montalbano's reputation and business will permanently damage the business relationships between Dr. Montalbano, his patients, and those medical institutions and insurance companies in the community with which he is affiliated and conducts business.

73. As a direct and proximate result of Defendants' reckless actions, Plaintiff has been damaged and is entitled to be compensated for those damages in an amount to be

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determined at trial.

**FOURTH CAUSE OF ACTION**  
**Interference with Prospective**  
**Contractual Relations or Business Expectations**

74. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

75. Dr. Montalbano has continuing professional and business relationships with other physicians, medical institutions and insurance companies that permit Dr. Montalbano to practice at their facilities and/or bill and collect money for services rendered.

76. Defendants knew of the relationships between Dr. Montalbano and these physicians, institutions and companies and acted recklessly in their actions.

77. Defendants recklessly, intentionally, and wrongfully interfered with these relationships and business expectations by their bad faith actions outlined herein (with the intent to benefit SMI), and as a direct and proximate result, Plaintiff has been damaged in an amount to be determined at trial.

**FIFTH CAUSE OF ACTION**  
**Defamation *Per Se*, Libel *Per Se*, and Slander *Per Se***

78. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

79. Defendants have maliciously, willfully and intentionally defamed Plaintiff by fabricating instances of misconduct, exaggerating and misrepresenting Dr. Montalbano's behavior, the circumstances surrounding alleged incidents of disruptive behavior, and reporting such false and defamatory statements to members of the Medical Staff at SARMC, St. Luke's Regional Medical Center, members of the medical community, health care insurers and state and federal regulatory authorities, including but not limited to, the Idaho State Board of Medicine, all in furtherance of its attempt to damage Dr. Montalbano's reputation and make it difficult for Dr.

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Montalbano to compete as a neurosurgeon, specializing in orthopedic spine care, with SARMC, SMI, and Dr. Zimmerman.

80. Defendants, by improperly suspending Dr. Montalbano's medical staff privileges, and other defamatory conduct and statements set forth herein, knew that Dr. Montalbano would be compelled to disclose the outcome and recommendations of the SARMC committees in connection with applications for hospital medical staff privileges of other institutions in Southern Idaho where he held privileges or could have applied for privileges, malpractice insurance, membership in professional organizations, credentialing with health insurers and related purposes.

81. Dr. Montalbano, in fact, has been compelled to disclose the outcome of SARMC's actions to malpractice insurers, licensing boards, state and federal regulatory agencies, health insurance companies and other healthcare institutions, and will be compelled to make further disclosures of this type for the remainder of his professional career.

82. Defendants' reckless conduct and actions were performed with malice, ill will, personal spite, with knowledge that they were false or with reckless disregard as to its truth or falsity, and for the purpose of injuring Dr. Montalbano's professional reputation and preventing competition from Dr. Montalbano for an indefinite period of time, all in an effort to support SMI's efforts to compete with Dr. Montalbano.

83. By reason of the foregoing, Defendants have uttered and published false and defamatory statements about Dr. Montalbano in writing and, upon information and belief, orally, with respect to Dr. Montalbano's conduct and have compelled Dr. Montalbano to repeat Defendants' defamation to others in connection with his professional career, with the intent of steering business away from Dr. Montalbano and to SARMC and SMI thereby limiting competition.

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84. Such statements constitute defamation *per se*, libel *per se* and/or slander *per se*.

85. Plaintiff's business and personal reputation has been damaged. Plaintiff has been and will continue to be damaged in the future financially as a result of such defamatory statements, causing damage in an amount to be proven at trial.

**SIXTH CAUSE OF ACTION**  
**Denial of Common Law Fair Procedure Rights**

86. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

87. SARMC failed to comply with the MSPP when it merged Dr. Montalbano's Qstatim reports against Dr. Fox and Dr. Zimmerman with the Parks' Qstatim Report, resulting in an indefinite suspension of privileges, without a hearing and due process.

88. As a result of SARMC's failure to comply with the MSPP, Dr. Montalbano did not have an opportunity to adequately defend himself, which is a denial of his common law right to a fair procedure and a violation of the terms of the MSPP.

89. The decision by SARMC to indefinitely suspend his privileges on January 14, 2009, after its investigation of his Qstatim reports, without a hearing, was without justification and not supported by any reasonable ground and constitutes a violation Dr. Montalbano's common law right to a fair procedure and due process and the terms of the MSPP.

90. As a direct and proximate result of Defendants' actions, Plaintiff has been damaged, will continue to be damaged in the future, and is entitled to be compensated for those damages in an amount to be determined at trial.

**SEVENTH CAUSE OF ACTION**  
**Breach of Fiduciary Duties**

91. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

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92. Dr. Montalbano trusted in and relied upon Defendant SARMC to comply with the terms of the MSPP and assure that proper policies and procedures were implemented, established, and adhered to both by SARMC and those appointed by SARMC to serve on committees and in position of authority. This relationship of trust and confidence between Dr. Montalbano and SARMC established fiduciary duties on behalf of SARMC to act in good faith and with due regard to Dr. Montalbano's interests.

93. SARMC breached said fiduciary duties by, *inter alia*, inducing Dr. Zimmerman, Dr. Fox, and other unnamed parties, to conspire to damage Dr. Montalbano's professional reputation and wrongfully suspend Dr. Montalbano's privileges. Defendants' conduct was reckless in this regard.

94. As a result of these breaches of fiduciary duties, Plaintiff has been damaged and will continue to be damaged in an amount to be proved at trial.

**EIGHTH CAUSE OF ACTION**  
**Violation of Due Process Rights**

95. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

96. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when they chose to ignore and disregard the sworn testimony of the only individual who was directly involved with Dr. Montalbano and the incident related to Patient X, which wholly refuted the testimony of Parks and the statements made in her Qstatim report.

97. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when it refused to dismiss a false, unsupportable, unfounded Qstatim report and allowed said false and unsupported Qstatim report to continue through SARMC's appellate review system.

98. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when it suspended his privileges on January 14, 2009, after an investigation of his Qstatim

reports, but prior to affording Dr. Montalbano his right to a fair hearing.

99. The decision by the MEC and SARMC to repeatedly ignore the sworn testimony of the only person to have direct contact with Dr. Montalbano regarding the situation with Patient X and to allow a false, unsupported, and unfounded Qstatim report to be pursued through the SARMC's appellate review system is patently unfair to Dr. Montalbano and violates his due process rights, as well as the terms of the MSPP.

100. The decision by the MEC and SARMC to indefinitely suspend Dr. Montalbano's privileges on January 14, 2009, after its investigation, but before affording Dr. Montalbano a right to a fair hearing, is patently unfair to Dr. Montalbano and violates his due process rights, as well as the terms of the MSPP.

101. As a direct and proximate result of Defendant SARMC's reckless actions, Plaintiff has been damaged, will continue to be damaged in the future, and is entitled to be compensated for those damages in an amount to be determined at trial.

**NINTH CAUSE OF ACTION**  
**Intentional and/or Negligent Infliction of Emotional Distress**

102. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

103. Defendants and their agents intentionally, willingly, recklessly, and/or negligently inflicted emotional distress upon Dr. Montalbano by acting in bad faith and unjustly suspending Dr. Montalbano's privileges at SARMC.

104. As a result of Defendants' reckless, extreme and outrageous conduct, Dr. Montalbano has suffered, and continues to suffer, severe emotional distress, including physical manifestations of that distress.

105. Defendants' acts and/or omissions were intentional, reckless, willful, malicious, and/or grossly negligent.

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106. As a direct and proximate result of the wrongful acts of Defendants, Plaintiff has been damaged in an amount to be proven at trial.

**TENTH CAUSE OF ACTION**  
**Injunctive Relief**

107. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

108. Dr. Montalbano has a right to earn a living and has done so through the practice of medicine. He has been, and continues to be, greatly harmed due to his exclusion from the medical staff of SARMC and the perpetual damage to his professional and personal reputation .

109. Based upon the improper refusal of SARMC to renew Dr. Montalbano's privileges, Dr. Montalbano seeks injunctive relief revoking the report to the National Practitioner Data Bank, restoring his privileges and his ability to earn a living, to which he is entitled, pending the final outcome of the present action.

**REQUEST FOR ATTORNEY FEES**

Plaintiff has been required to retain counsel to pursue this matter. Plaintiff has retained the law firm of POWERS THOMSON, P.C., and has agreed to pay said attorneys a reasonable fee. Plaintiff is entitled to recover his reasonable costs and attorney fees incurred in the prosecution of this matter pursuant to Rule 54 of the Idaho Rules of Civil Procedure and Idaho Code §12-121, or other applicable law.

**PRAYER**

Plaintiff's claims for damages exceed the jurisdiction amount of this Court and include, but are not limited to loss of income due to Dr. Montalbano's inability to perform surgery at SARMC, damage to his reputation, interference with his past and present business and professional relations, and emotional distress.

WHEREFORE, Plaintiff prays for judgment against the above-named Defendants

as follows:

1. Pursuant to Plaintiff's First Claim for Relief, he be awarded damages in an amount to be proven at trial;
2. Pursuant to Plaintiff's Second Claim for Relief, he be awarded damages in an amount to be proven at trial;
3. Pursuant to Plaintiff's Third Claim for Relief, he be awarded damages in an amount to be proven at trial;
4. Pursuant to Plaintiff's Fourth Claim for Relief, he be awarded damages in an amount to be proven at trial;
5. Pursuant to Plaintiff's Fifth Claim for Relief, he be awarded damages in an amount to be proven at trial;
6. Pursuant to Plaintiff's Sixth Claim for Relief, he be awarded damages in an amount to be proven at trial;
7. Pursuant to Plaintiff's Seventh Claim for Relief, he be awarded damages in an amount to be proven at trial;
8. Pursuant to Plaintiff's Eighth Claim for Relief, he be awarded damages in an amount to be proven at trial;
9. Pursuant to Plaintiff's Ninth Claim for Relief, he be awarded damages in an amount to be proven at trial; and
10. Pursuant to Plaintiff's Tenth Claim for Relief, he be awarded damages in an amount to be proven at trial.

#### **PUNITIVE DAMAGES**

Plaintiff reserves the right to amend this complaint to include a cause of action for punitive damages, pursuant to Idaho Code § 6-1604.

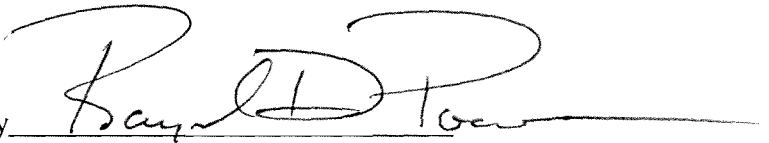
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### DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all issues so triable pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure, and will not stipulate to a jury of less than 12 jurors.

DATED this 4<sup>th</sup> day of August, 2009.

POWERS THOMSON, PC

By 

Raymond D. Powers – Of the Firm  
Portia L. Jenkins – Of the Firm  
Attorneys for Plaintiffs

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**VERIFICATION**

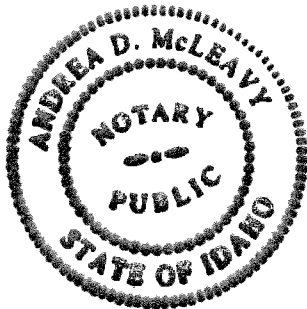
STATE OF IDAHO     )  
                                      ) ss.  
County of Ada         )

PAUL J. MONTALBANO, M.D., being first duly sworn upon oath, deposes and says:

That he is the plaintiff in the above-entitled action and that he has read the foregoing Complaint and Demand for Jury Trial, knows the contents thereof, and believes the same to be true.

Paul J. Montalbano, M.D.  
Paul J. Montalbano, M.D.

SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of August, 2009.



Andrea D. McLeavy  
Notary Public for Idaho

Residing at Mendocino, Idaho

Commission expires 3/26/13

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ORIGINAL

NO. \_\_\_\_\_  
FILED P.M. 3:45  
A.M. \_\_\_\_\_

AUG 19 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiff PAUL J. MONTALBANO, M.D., by and through his attorneys of record, POWERS THOMSON, P.C., and hereby alleges the following as and for claims against Defendants in the above-captioned litigation.

## **JURISDICTION & PARTIES**

1. Plaintiff Paul J. Montalbano, M.D. (Dr. Montalbano) is an Idaho resident and neurosurgeon surgeon, specializing in spine surgery, licensed and practicing medicine in the State of Idaho.

2. Saint Alphonsus Regional Medical Center (SARMC) is a non-profit corporation conducting business and providing medical services to the general public in the state of Idaho.

3. Sherry Parks is an Idaho resident and at all relevant times was an employee of SARMC.

4. Christian G. Zimmerman, M.D. (Dr. Zimmerman) is an Idaho resident licensed and practicing medicine in the State of Idaho. Dr. Zimmerman is a neurosurgeon whose specialty includes the practice of spine surgery. Dr. Zimmerman is affiliated with the Spine Medicine Institute and is employed by SARMC.

5. Donald Fox, M.D. (Dr. Fox) is an Idaho resident licensed and practicing medicine in the State of Idaho. Dr. Fox's specialty is anesthesia. Dr. Fox served as President of the SARMC Medical Staff during the relevant time periods involved in this lawsuit and is compensated by SARMC through a written agreement.

6. Jurisdiction and venue are proper in this Court under Idaho Code §5-404. The amount in controversy exceeds the jurisdictional threshold of this Court.

## **FACTS**

7. Dr. Montalbano applied for and was granted medical staff privileges at SARMC in 2000. Since that time and until January 14, 2009, Dr. Montalbano's privileges were renewed at SARMC on a regular basis. Each time Dr. Montalbano's privileges were renewed, SARMC presented him with a new set of Bylaws and Medical Staff Policies and Plans ("MSPP").

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8. In 2006, the Spine Medicine Institute ("SMI") was conceived and created by SARMC. It was at the time and remains the vision of SMI at SARMC to be the destination spine care program for the Northwest. SMI offers multidisciplinary management of back and neck pain, including medical evaluation, diagnostic imaging, pain management, physical therapy, spine surgery, psychosocial care. SMI competes directly with the services offered by Dr. Montalbano.

9. Dr. Montalbano, SARMC, and SARMC's agents agreed to act and deal with one another in a consistent fashion by virtue of the Bylaws and MSPP. By virtue of their respective conduct and actions, SARMC and Dr. Montalbano entered into a fiduciary relationship pursuant to SARMC's MSPP and Bylaws as a result of Dr. Montalbano being granted renewed privileges and continuously practicing medicine at SARMC.

10. The actions and conduct of SARMC and Dr. Montalbano established duties and responsibilities between SARMC and Dr. Montalbano wherein both parties held reasonable expectations that each would act in good faith in fulfilling their respective responsibilities set forth in the SARMC MSPP and Bylaws.

11. Under Chapter X, Section 4 of the MSPP, complaints alleging disruptive conduct concerning a practitioner should be reported in SARMC's Qstatim reporting system.

12. On April 1, 2008, Sherry Parks (Parks) filed a Qstatim report alleging disruptive behavior on the part of Dr. Montalbano regarding an incident involving a patient (Patient X) on March 31, 2008. The information provided in the report by defendant Parks was false and Parks knew it was false and not accurate when she prepared the report.

13. The SARMC Bylaws provide that Qstatim reports will be forwarded to the Event Report Triage Committee to review the information contained in Qstatim reports and determine whether the reports have merit and should be addressed further by other committees.

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14. The Qstatim triage committee reviewed the Qstatim report filed by Parks and referred it to the Physician Professional Practice Committee (PPPC) for evaluation upon determining that the report warranted further review.

15. Both the triage committee and the PPPC accepted Parks' version of the facts as reported in her Qstatim report as true statements, without determining whether the allegations were true and accurate and could be corroborated by others involved in the matter.

16. Based upon its failure to properly evaluate the Qstatim report, the PPPC recommended to the Medical Executive Committee (MEC) that the MEC appoint an ad hoc committee to further investigate Parks' Qstatim report, pursuant to the Corrective Action Plan of the Bylaws.

17. On April 28, 2008, the MEC voted to appoint a three-person panel of physicians to serve as the Ad Hoc Committee. The MEC directed the Ad Hoc Committee to investigate Parks' Qstatim report and make a recommendation. The Ad Hoc Committee conducted interviews with hospital staff who were either directly or indirectly involved, including Sherry Parks, who did not communicate with Dr. Montalbano but who prepared the Qstatim report, and Jeannie Parker, who had the direct communication with Dr. Montalbano. Through the information presented by the witnesses, the Ad Hoc Committee knew that the Parks' Qstatim report was not credible, that Parks' testimony was not corroborated by other witnesses, and that the report contained false statements, false accusations, and misrepresented the facts.

18. The Ad Hoc Committee failed to execute its investigative authority and conduct an independent, objective investigation when it relied upon the preconceived notion that Parks' Qstatim report had merit and the information in the report was true.

19. In the spring of 2008, Dr. Fox, as President of the Medical Staff, disclosed to Dr. Zimmerman confidential information regarding the investigation and the deliberations taking

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place regarding the Ad Hoc Committee's review of the allegations against Dr. Montalbano and, in doing so, breached his responsibilities as President of the Medical Staff and the hospital's confidentiality policy as outlined in Article I, Section 7 of the Bylaws and Article VII, Section 3 of the Bylaws.

20. Dr. Zimmerman breached SARMC's confidentiality policy and disruptive conduct policy when he chose to share with other individuals employed by and affiliated with the hospital the information he had learned from Dr. Fox. In doing so, Dr. Zimmerman intended to damage the reputation of Dr. Montalbano in the medical community.

21. By letter of June 24, 2008, Dr. Montalbano notified SARMC of his knowledge of this breach of confidentiality by Dr. Zimmerman and requested an investigation into Dr. Zimmerman's conduct.

22. On July 25, 2008, Dr. Fox responded to Dr. Montalbano's letter without addressing Dr. Montalbano's substantive concerns. Subsequently, Dr. Fox admitted under oath not conducting a legitimate investigation of Dr. Montalbano's concerns.

23. Through a letter dated August 6, 2008, Dr. Montalbano notified the MEC and the PPPC of his dissatisfaction with the response to his confidentiality concerns and the failure to conduct a bona fide investigation of his concerns. Dr. Montalbano put the MEC and SARMC on notice through this letter that Dr. Fox was the person who divulged the confidential information to Dr. Zimmerman. No substantive response was provided by the MEC or PPPC.

24. Despite knowing the Parks' Qstatim report was not credible, in August of 2008, the Ad Hoc Committee erroneously concluded that Dr. Montalbano violated the Conduct Policy and recommended a 90-day suspension of privileges to be withheld pending Dr. Montalbano's exercise of his fair hearing rights as required under the SARMC MSPP.

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25. On August 25, 2008, the MEC voted to approve the Ad Hoc Committee's recommendation of a 90-day suspension. Dr. Fox and the Ad Hoc Committee intentionally withheld relevant information from the MEC in presenting the recommendation of the Ad Hoc Committee. The basis for the MEC's recommendation was the false information contained in the Parks' Qstatim report that SARMC, Dr. Fox, and the Ad Hoc Committee knew contained false statements, false accusations, misrepresented the facts, and had been filed by a person they knew did not have any direct contact or communication at all with Dr. Montalbano. Despite this knowledge, Dr. Fox and members of the Ad Hoc Committee did not inform members of the MEC that Jeannie Parker's testimony rendered Parks' Qstatim report not credible.

26. After the MEC approved the Ad Hoc Committee recommendation, Dr. Zimmerman was informed of the decision as a result of breach of confidentiality and again disclosed and made public the confidential information related to the recommendation in violation of SARMC's MSPP. This disclosure was intended to damage the reputation of Dr. Montalbano in the medical community.

27. Dr. Zimmerman has continued to disclose confidential information to the public in violation of SARMC's MSPP and in an effort to damage Dr. Montalbano's professional reputation in the medical community.

28. Throughout the course of conduct alleged, Dr. Zimmerman was not a member of the MEC, the Ad Hoc Committee investigating Dr. Montalbano, or a member of any professional review body responsible for investigating the allegations of disruptive behavior against Dr. Montalbano.

29. Dr. Montalbano exercised his right to a Fair Hearing in a timely manner under Chapter XII of the MSPP.

30. On December 2, 2008, Dr. Montalbano filed a formal Qstatim report against Dr. Zimmerman for his continued breaches of confidentiality from June 2008 through December 2008 as alleged above.

31. On December 2, 2008, Dr. Montalbano also filed a formal Qstatim report against Dr. Fox for disparaging comments Dr. Fox made against Dr. Montalbano while providing anesthesia services at SARMC.

32. On December 18, 2008, Dr. Kevin Clifford, chairman of the PPPC, issued an unfounded and improper precautionary suspension of privileges upon Dr. Montalbano while the MEC further investigated the Qstatim reports he had filed against Drs. Fox and Zimmerman. This suspension violated the terms of the MSPP.

33. Five days later, on December 23, 2008, the MEC determined the precautionary suspension violated the terms of the MSPP and reinstated Dr. Montalbano's privileges pending an investigation of the Qstatim reports filed by Dr. Montalbano.

34. In a follow up letter to Dr. Montalbano dated December 30, 2008, Dr. Clifford claimed that the unfounded, precautionary suspension had nothing to do with Dr. Montalbano's clinical skills or surgical expertise but was related to disruption with a potential to affect patient safety.

35. The MEC negligently and in violation of the MSPP voted to re-commission the same Ad Hoc Committee that had previously investigated the Parks' Qstatim report against Dr. Montalbano and charged the same Ad Hoc Committee with the responsibility of investigating Dr. Montalbano's Qstatim reports regarding Drs. Fox and Zimmerman.

36. On January 5, 2009, the Ad Hoc Committee met to review the circumstances of Dr. Montalbano's Qstatim reports and was provided the same summary profile by the MEC that it had been provided during its investigation of the Parks' Qstatim report.

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37. On January 14, 2009, after a cursory and incomplete investigation, the Ad Hoc Committee erroneously concluded that Dr. Montalbano's filing of the two Qstatim reports was retaliatory and not legitimate. In violation of the terms of the MSPP, the Ad Hoc Committee recommended that the precautionary suspension originally imposed on Dr. Montalbano be reinstated on January 14, 2009, pending the final disposition of the ongoing hearing process relative to the Parks' Qstatim report.

38. Dr. Montalbano was not afforded due process through an opportunity for a fair hearing before his privileges were suspended on January 14, 2009, for an indefinite period of time in violation of the terms of the MSPP.

39. Dr. Montalbano's concerns about breaches of confidentiality and bias were not appropriately investigated. Instead Dr. Montalbano's Qstatim reports against Drs. Fox and Zimmerman were improperly directed to become part of the investigation involving the Parks' Qstatim report, even though Dr. Montalbano's reports did not involve Parks' Qstatim report or the incident involving Patient X.

40. The precautionary suspension of Dr. Montalbano's privileges imposed on January 14, 2009, was an inappropriate effort by SARMC and its agents to retaliate against Dr. Montalbano for challenging the veracity of Parks' Qstatim report and the recommendations flowing therefrom and for the filing of credible Qstatim reports against Drs. Fox and Zimmerman, who was at this time an employee of SARMC. Such retaliation is a violation of SARMC's policy against retaliation as outlined in the No Retaliation Policy, Chapter X, Section 9 of the MSPP. Furthermore, the effort by SARMC to "merge" two separate and independent investigations and actions into one process resulting in a suspension of privileges for an indefinite period of time without any due process rights violated the terms of the MSPP.

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41. The decision to indefinitely suspend Dr. Montalbano's privileges on January 14, 2009, is an adverse action taken by a professional review body and took effect after the Ad Hoc Committee's incomplete investigation in January of 2009. As such, Dr. Montalbano was entitled to certain rights under the MSPP that were intentionally not afforded him.

42. A hearing on the Parks' Qstatim report was held before the Fair Hearing Panel on February 16, 2009 and February 17, 2009. At the hearing, the panelists heard the sworn testimony of Parks and Parker. It was through this testimony that SARMC, its agents and employees were again placed on notice that the sworn testimony of Jeannie Parker, the person who had direct contact with Dr. Montalbano, directly refuted Sherry Parks' testimony and the facts she alleged in her Qstatim report of April 1, 2008.

43. At this juncture, SARMC and its agents had an obligation to dismiss the Parks Qstatim report against Dr. Montalbano when it again became apparent that the report contained intentional false statements, false accusations, intentional misrepresentations of the facts, and was from an employee whose testimony was refuted and uncorroborated by other credible witnesses and the evidence. By failing to dismiss the Parks' Qstatim report, SARMC knowingly and recklessly furthered a process supported by false claims.

44. The Fair Hearing Panel upheld the 90-day suspension recommendation of the MEC on the Parks' Qstatim report. In doing so, the Fair Hearing Panel also noted that the Qstatim reports filed by Dr. Montalbano had been found to be retaliatory by the Ad Hoc Committee, once again violating the terms of the MSPP requiring that the Parks' Qstatim and Dr. Montalbano's Qstatim be investigated separately.

45. Defendant SARMC has intentionally, and with reckless disregard for the consequences, merged the Parks Qstatim report and the separate and distinct Qstatim reports

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filed by Dr. Montalbano, resulting in a suspension, which took effect prior to the conclusion reached by the Fair Hearing Panel and without the right to a hearing.

46. Dr. Montalbano appealed the recommendation of the Fair Hearing Panel as provided for under Chapter XI, Section 20 of the MSPP. An appellate review panel was appointed and heard the matter on May 18, 2009. At the hearing, Dr. Montalbano again asked SARMC and its agents to recognize the false accusations in the Parks' Qstatim report and dismiss the matter. SARMC and its agents refused to do so.

47. On June 10, 2009, the appellate review panel issued its recommendation consistent with the first Ad Hoc Committee recommendation that Dr. Montalbano be suspended for 90 days, which the Board of Trustees adopted as final on June 19, 2009. Despite reaching this conclusion, the appellate review panel conceded and affirmed that Ms. Parks' testimony was contradicted by the testimony of other witnesses and the accuracy of many of her statements regarding the conversation between Dr. Montalbano and Jeannie Parker was questionable.

48. By virtue of merging Dr. Montalbano's Qstatim reports and Parks' Qstatim report, Dr. Montalbano's privileges will have been suspended for a total of eight months, which is five months longer than the Ad Hoc Committee's recommended suspension for the Parks' Qstatim report. SARMC, through its agents, effectively imposed a suspension of five months upon Dr. Montalbano for a matter separate from the Parks' Qstatim report without any right to a hearing as required under the MSPP. In so doing, it damaged Dr. Montalbano's professional reputation and precluded him from practicing his profession and providing his services to the community.

49. SARMC has reported the improper suspension of Dr. Montalbano to the National Practitioner Data Bank, Idaho State Board of Medicine, and other health care institutions and medical insurers.

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50. Together SARMC, its agents, employees and Board Members, Dr. Zimmerman and Dr. Fox conspired to damage Dr. Montalbano's professional reputation and his ability to practice spine surgery in Boise, Idaho. This effort continues on the date of the filing of this complaint.

**FIRST CAUSE OF ACTION**  
**Civil Conspiracy**

51. Plaintiff herein adopts and incorporate by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

52. SARMC, Parks, Dr. Fox and Dr. Zimmerman, as well as with other unnamed co-conspirators, who include physicians and hospital staff employed by or who are agents of SARMC and SMI, conspired with malice and intent to injure Plaintiff's professional practice and reputation and;

- (a) engaged in a pattern of conduct pursuant to which they improperly removed Dr. Montalbano from the SARMC medical staff in bad faith, thus preventing Dr. Montalbano from pursuing his livelihood and practicing his specialty in the hospital;
- (b) fabricated and exaggerated claims against Dr. Montalbano regarding his behavior, used discriminatory criteria in determining the validity of Qstatim reports filed by and against Dr. Montalbano, and acted in secrecy to further their personal and corporate interests rather than those of the patients of SARMC;
- (c) subverted the mandated SARMC corrective action plan process and SARMC's MSPP and Bylaws;
- (d) concealed the real anti-competitive motives for suspending Dr. Montalbano's medical staff privileges;

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- (e) caused Dr. Montalbano's privileges to be suspended by SARMC by improperly influencing and manipulating the SARMC Medical Executive Committee in bad faith; and
- (f) fabricated additional allegations against Dr. Montalbano during the pendency of and following the appeal process from his suspension of medical staff privileges at SARMC in an attempt to further alter the record and give credibility to their arbitrary actions.

53. Such conduct has harmed and will continue to harm in the future, consumers of orthopedic neck and back care in Southwestern Idaho.

54. The actions taken by Defendants SARMC, Parks, Dr. Fox and Dr. Zimmerman were intended to damage Dr. Montalbano's reputation, career and his ability to practice at SARMC while furthering the interests of SMI.

55. As a direct and proximate result of the reckless, wrongful acts of Defendants, Plaintiff has been damaged in an amount to be proven at trial.

**SECOND CAUSE OF ACTION**  
**Breach of Covenant of**  
**Good Faith and Fair Dealing**

56. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

57. SARMC intentionally and recklessly failed to comply with its own Bylaws and MSPP when it did not dismiss the Parks' Qstatim report once it knew that the report contained false information, false accusations, and misrepresented the facts, thereby breaching its duty of good faith and fair dealing with Dr. Montalbano.

58. SARMC failed to comply with its own Bylaws and MSPP when it did not properly and fully investigate Dr. Montalbano's Qstatim reports, but instead classified them as

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being retaliatory which had the affect of merging them with the Parks' Qstatim report thereby breaching its duty of good faith and fair dealing with Dr. Montalbano in violation of the terms of the MSPP.

59. SARMC failed to comply with its own MSPP when it did not afford Dr. Montalbano with a fair hearing before it suspended his privileges indefinitely on January 14, 2009, under the false guise of a precautionary suspension.

60. SARMC failed to comply with the MSPP and inappropriately manipulated the MSPP for the purpose of impairing Dr. Montalbano's ability to practice at SARMC.

61. As a result of SARMC's failure to comply with the MSPP and Bylaws, SARMC unjustly and without good cause suspended Dr. Montalbano's privileges for 90 days based on a Qstatim report that the SARMC knew and conceded contained false statements, false accusations, and misrepresented the facts involving Patient X.

62. Dr. Fox breached the covenant of good faith and fair dealing when he disclosed confidential information to Dr. Zimmerman regarding the status of the Ad Hoc Committee investigation.

63. As a result of SARMC's failure to comply with the MSPP and Bylaws, SARMC unjustly and without good cause indefinitely suspended Dr. Montalbano's privileges on January 14, 2009, after its investigation, under the false guise of a precautionary suspension.

64. SARMC and Dr. Fox breached the covenant of good faith and fair dealing when they did not dismiss the Parks' Qstatim report when they knew the report was based on false statements, false accusations, and misrepresented the facts involving Patient X.

65. SARMC and Dr. Fox breached the covenant of good faith and fair dealing when they suspended Dr. Montalbano's privileges on January 14, 2009, after investigating the Qstatim

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reports that Dr. Montalbano had filed, without affording him his due process rights to a fair hearing prior to the indefinite suspension.

66. Defendants SARMC and Dr. Fox breached the covenant of good faith and fair dealing by conspiring to present information in a biased fashion, omitting important facts and presenting erroneous facts in the presence of the MEC in order to manipulate the vote of the MEC.

67. Defendants SARMC and Dr. Fox breached the covenant of good faith and fair dealing by failing to discharge their responsibilities as outlined in the MSPP and as required by the Health Care Quality Improvement Act of 1986 (HCQIA).

68. As a direct and proximate result of Defendants SARMC's and Dr. Fox's actions, Plaintiff has been damaged and is entitled to be compensated for those damages in an amount to be determined at trial.

**THIRD CAUSE OF ACTION  
Intentional and/or Negligent  
Interference with Economic Advantage**

69. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

70. Dr. Montalbano has been a member of the Boise medical community for nine years and has established a wide patient base throughout Southern Idaho and is affiliated with a number of medical institutions, corporations, federal and state health care reimbursement programs, and public and private insurance companies doing business in the community. Dr. Montalbano has invested substantial sums of money to establish continuing treatment relationships with patients, members of the medical community, colleagues, insurance companies and institutions in the community.

71. Defendants knew or should have known about the relationships established

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between Dr. Montalbano, his patients, physicians, and other institutions in the medical community.

72. SARMC's "double" suspension of Dr. Montalbano's privileges, despite its knowledge of the falsity of the Qstatim report and the improper merger of Dr. Montalbano's Qstatim reports with Parks' Qstatim report, was an intentional and reckless attempt to harm and undermine Dr. Montalbano's professional practice. SARMC's conduct amounts to dishonest, reckless, improper, and unfair acts to affirmatively damage Dr. Montalbano's reputation.

73. The reckless interference by Defendants with Dr. Montalbano's reputation and business will permanently damage the business relationships between Dr. Montalbano, his patients, and those medical institutions and insurance companies in the community with which he is affiliated and conducts business.

74. As a direct and proximate result of Defendants' reckless actions, Plaintiff has been damaged and is entitled to be compensated for those damages in an amount to be determined at trial.

**FOURTH CAUSE OF ACTION**  
**Interference with Prospective**  
**Contractual Relations or Business Expectations**

75. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

76. Dr. Montalbano has continuing professional and business relationships with other physicians, medical institutions, corporations, public and private insurance companies, and federal and state health care reimbursement programs that permit Dr. Montalbano to practice at their facilities and/or bill and collect money for services rendered.

77. Defendants knew of the relationships between Dr. Montalbano and these entities and acted recklessly in their actions.

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78. Defendants recklessly, intentionally, and wrongfully interfered with these relationships and business expectations by their bad faith actions outlined herein (with the intent to benefit SMI), and as a direct and proximate result, Plaintiff has been damaged in an amount to be determined at trial.

**FIFTH CAUSE OF ACTION**  
**Defamation *Per Se*, Libel *Per Se*, and Slander *Per Se***

79. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

80. Defendants have maliciously, willfully and intentionally defamed Plaintiff by fabricating instances of misconduct, exaggerating and misrepresenting Dr. Montalbano's behavior, the circumstances surrounding alleged incidents of disruptive behavior, and reporting such false and defamatory statements to members of the Medical Staff at SARMC, St. Luke's Regional Medical Center, members of the medical community, health care insurers and state and federal regulatory authorities, including but not limited to, the Idaho State Board of Medicine, all in furtherance of its attempt to damage Dr. Montalbano's reputation and make it difficult for Dr. Montalbano to compete as a neurosurgeon, specializing in orthopedic spine care, with SARMC, SMI, and Dr. Zimmerman.

81. Defendants, by improperly suspending Dr. Montalbano's medical staff privileges, and other defamatory conduct and statements set forth herein, knew that Dr. Montalbano would be compelled to disclose the outcome and recommendations of the SARMC committees in connection with applications for hospital medical staff privileges of other institutions in Southern Idaho where he held privileges or could have applied for privileges, malpractice insurance, membership in professional organizations, credentialing with health insurers and related purposes.

82. Dr. Montalbano, in fact, has been compelled to disclose the outcome of SARMC's actions to malpractice insurers, licensing boards, state and federal regulatory agencies, private and public health insurance companies and other healthcare institutions, and will be compelled to make further disclosures of this type for the remainder of his professional career.

83. Defendants' reckless conduct and actions were performed with malice, ill will, personal spite, with knowledge that they were false or with reckless disregard as to its truth or falsity, and for the purpose of injuring Dr. Montalbano's professional reputation and preventing competition from Dr. Montalbano for an indefinite period of time, all in an effort to support SMI's efforts to compete with Dr. Montalbano.

84. By reason of the foregoing, Defendants have uttered and published false and defamatory statements about Dr. Montalbano in writing and, upon information and belief, orally, with respect to Dr. Montalbano's conduct and have compelled Dr. Montalbano to repeat Defendants' defamation to others in connection with his professional career, with the intent of steering business away from Dr. Montalbano and to SARMC and SMI thereby limiting competition.

85. Such statements constitute defamation *per se*, libel *per se* and/or slander *per se*.

86. Plaintiff's business and personal reputation has been damaged. Plaintiff has been and will continue to be damaged in the future financially as a result of such defamatory statements, causing damage in an amount to be proven at trial.

**SIXTH CAUSE OF ACTION**  
**Denial of Common Law Fair Procedure Rights**

87. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

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88. SARMC failed to comply with the MSPP when it merged Dr. Montalbano's Qstatim reports against Dr. Fox and Dr. Zimmerman with the Parks' Qstatim Report, resulting in an indefinite suspension of privileges, without a hearing and due process.

89. As a result of SARMC's failure to comply with the MSPP, Dr. Montalbano did not have an opportunity to adequately defend himself, which is a denial of his common law right to a fair procedure and a violation of the terms of the MSPP.

90. The decision by SARMC to indefinitely suspend his privileges on January 14, 2009, after its investigation of his Qstatim reports, without a hearing, was without justification and not supported by any reasonable ground and constitutes a violation Dr. Montalbano's common law right to a fair procedure and due process and the terms of the MSPP.

91. As a direct and proximate result of SARMC's actions, Plaintiff has been damaged, will continue to be damaged in the future, and is entitled to be compensated for those damages in an amount to be determined at trial.

### **SEVENTH CAUSE OF ACTION**

#### **Breach of Fiduciary Duties**

92. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

93. Dr. Montalbano trusted in and relied upon SARMC to comply with the terms of the MSPP and assure that proper policies and procedures were implemented, established, and adhered to by SARMC, its employees, and those appointed by SARMC to serve on committees and in position of authority. This relationship of trust and confidence between Dr. Montalbano and SARMC established fiduciary duties on behalf of SARMC to act in good faith and with due regard to Dr. Montalbano's interests.

94. SARMC breached said fiduciary duties by, *inter alia*, inducing Parks, Dr. Zimmerman, Dr. Fox, and other unnamed parties, to conspire to damage Dr. Montalbano's

professional reputation and wrongfully suspend Dr. Montalbano's privileges. SARMC's conduct was reckless in this regard.

95. As a result of these breaches of fiduciary duties, Plaintiff has been damaged and will continue to be damaged in an amount to be proved at trial.

**EIGHTH CAUSE OF ACTION**  
**Violation of Due Process Rights**

96. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

97. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when they chose to ignore and disregard the sworn testimony of the only individual who was directly involved with Dr. Montalbano and the incident related to Patient X, which wholly refuted the testimony of Parks and the statements made in her Qstatim report.

98. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when it refused to dismiss a false, unsupportable, unfounded Qstatim report and allowed said false and unsupported Qstatim report to continue through SARMC's appellate review system.

99. SARMC violated Dr. Montalbano's due process rights and the terms of the MSPP when it suspended his privileges on January 14, 2009, after an investigation of his Qstatim reports, but prior to affording Dr. Montalbano his right to a fair hearing.

100. The decision by the MEC and SARMC to repeatedly ignore the sworn testimony of the only person to have direct contact with Dr. Montalbano regarding the situation with Patient X and to allow a false, unsupported, and unfounded Qstatim report to be pursued through the SARMC's appellate review system is patently unfair to Dr. Montalbano and violates his due process rights, as well as the terms of the MSPP.

101. The decision by the MEC and SARMC to indefinitely suspend Dr. Montalbano's privileges on January 14, 2009, after its investigation, but before affording Dr. Montalbano a

right to a fair hearing, is patently unfair to Dr. Montalbano and violates his due process rights, as well as the terms of the MSPP.

102. As a direct and proximate result of SARMC's reckless actions, Plaintiff has been damaged, will continue to be damaged in the future, and is entitled to be compensated for those damages in an amount to be determined at trial.

**NINTH CAUSE OF ACTION**  
**Intentional and/or Negligent Infliction of Emotional Distress**

103. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

104. Defendants and their agents intentionally, willingly, recklessly, and/or negligently inflicted emotional distress upon Dr. Montalbano by acting in bad faith and unjustly suspending Dr. Montalbano's privileges at SARMC.

105. As a result of Defendants' reckless, extreme and outrageous conduct, Dr. Montalbano has suffered, and continues to suffer, severe emotional distress, including physical manifestations of that distress.

106. Defendants' acts and/or omissions were intentional, reckless, willful, malicious, and/or grossly negligent.

107. As a direct and proximate result of the wrongful acts of Defendants, Plaintiff has been damaged in an amount to be proven at trial.

**TENTH CAUSE OF ACTION**  
**Injunctive Relief**

108. Plaintiff herein adopts and incorporates by reference all of the allegations set forth in the foregoing paragraphs and further alleges:

109. Dr. Montalbano has a right to earn a living and has done so through the practice of medicine. He has been, and continues to be, greatly harmed due to his exclusion from the

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medical staff of SARMC and the perpetual damage to his professional and personal reputation.

110. Based upon the improper suspension of his privileges by SARMC, Dr. Montalbano seeks injunctive relief revoking the report to the National Practitioner Data Bank and restoring his privileges and his ability to earn a living, to which he is entitled, pending the final outcome of the present action.

### **REQUEST FOR ATTORNEY FEES**

Plaintiff has been required to retain counsel to pursue this matter. Plaintiff has retained the law firm of POWERS THOMSON, P.C., and has agreed to pay said attorneys a reasonable fee. Plaintiff is entitled to recover his reasonable costs and attorney fees incurred in the prosecution of this matter pursuant to Rule 54 of the Idaho Rules of Civil Procedure and Idaho Code §12-121, or other applicable law.

### **PRAYER**

Plaintiff's claims for damages exceed the jurisdiction amount of this Court and include, but are not limited to loss of income due to Dr. Montalbano's inability to perform surgery at SARMC, damage to his reputation, interference with his past and present business and professional relations, and emotional distress.

WHEREFORE, Plaintiff prays for judgment against the above-named Defendants as follows:

1. Pursuant to Plaintiff's First Claim for Relief, he be awarded damages in an amount to be proven at trial;
2. Pursuant to Plaintiff's Second Claim for Relief, he be awarded damages in an amount to be proven at trial;
3. Pursuant to Plaintiff's Third Claim for Relief, he be awarded damages in an amount to be proven at trial;

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4. Pursuant to Plaintiff's Fourth Claim for Relief, he be awarded damages in an amount to be proven at trial;

5. Pursuant to Plaintiff's Fifth Claim for Relief, he be awarded damages in an amount to be proven at trial;

6. Pursuant to Plaintiff's Sixth Claim for Relief, he be awarded damages in an amount to be proven at trial;

7. Pursuant to Plaintiff's Seventh Claim for Relief, he be awarded damages in an amount to be proven at trial;

8. Pursuant to Plaintiff's Eighth Claim for Relief, he be awarded damages in an amount to be proven at trial;

9. Pursuant to Plaintiff's Ninth Claim for Relief, he be awarded damages in an amount to be proven at trial; and

10. Pursuant to Plaintiff's Tenth Claim for Relief, he be awarded damages in an amount to be proven at trial.

#### **PUNITIVE DAMAGES**

Plaintiff reserves the right to amend this complaint to include a cause of action for punitive damages, pursuant to Idaho Code § 6-1604.


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**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury as to all issues so triable pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure, and will not stipulate to a jury of less than 12 jurors.

DATED this 18 day of August, 2009.

POWERS THOMSON, PC

By   
Raymond D. Powers – Of the Firm  
Portia L. Jenkins – Of the Firm  
Attorneys for Plaintiffs

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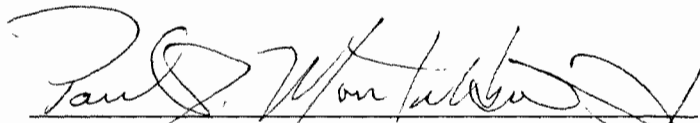


**VERIFICATION**

STATE OF IDAHO    )  
                              ) ss.  
County of Ada        )

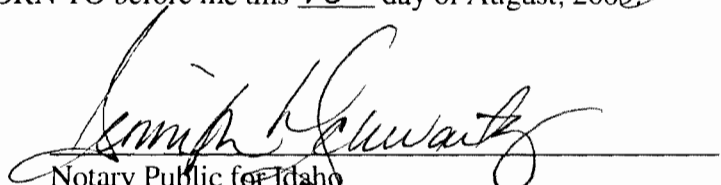
PAUL J. MONTALBANO, M.D., being first duly sworn upon oath, deposes and says:

That he is the plaintiff in the above-entitled action and that he has read the foregoing Amended Complaint and Demand for Jury Trial, knows the contents thereof, and believes the same to be true.

  
Paul J. Montalbano, M.D.

SUBSCRIBED AND SWORN TO before me this 18 day of August, 2009.



  
Notary Public for Idaho  
Residing at Bose  
Commission expires 7/20/11

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NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:30

SEP 08 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

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Attorneys for Defendants Saint Alphonsus Medical Center,  
Sherry Parks and Dr. Fox

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.	)	
	)	
Plaintiff,	)	No. CV OC 0914805
	)	
v.	)	<b>ANSWER OF DEFENDANTS SAINT</b>
	)	<b>ALPHONSUS REGIONAL MEDICAL</b>
SAINT ALPHONSUS REGIONAL	)	<b>CENTER AND DONALD FOX, M.D.</b>
MEDICAL CENTER; SHERRY PARKS;	)	
CHRISTIAN G. ZIMMERMAN, M.D.;	)	Filing Fee: \$58.00
and DONALD FOX, M.D.,	)	
	)	
Defendants.	)	
	)	

COMES NOW Defendants Saint Alphonsus Regional Medical Center and Donald Fox,  
M.D. ("Defendants"), by and through their attorneys of record, Givens Pursley LLP, and  
answering Plaintiff's Amended Complaint and Demand for Jury Trial ("Amended Complaint")  
on file herein, admit, deny and allege as follows:

## **JURISDICTION AND PARTIES**

1. Defendants admit the allegations in paragraph 1 of the Amended Complaint.
2. Defendants admit the allegations in paragraph 2 of the Amended Complaint.
3. Defendants admit the allegations in paragraph 3 of the Amended Complaint.
4. Defendants admit Christian G. Zimmerman, M.D. ("Dr. Zimmerman") is an Idaho resident licensed and practicing medicine in the state of Idaho and is a neurosurgeon whose specialty includes the practice of spine surgery. Defendants admit Dr. Zimmerman is employed by Saint Alphonsus Regional Medical Center ("SARMC"). Defendants deny the remaining allegations in paragraph 4 of the Amended Complaint.
5. Defendants admit Donald Fox, M.D. ("Dr. Fox") is an Idaho resident licensed and practicing medicine in the state of Idaho, and his specialty is anesthesia. Defendants admit Dr. Fox was elected President of the Medical Staff in February 2005. Defendants deny the remaining allegations in paragraph 5 of the Amended Complaint.
6. Defendants admit the jurisdiction and venue are proper in this Court under Idaho Code § 5-404.

## **FACTS**

7. Defendants admit Dr. Montalbano applied for and was granted medical staff privileges at SARMC in 2000. Defendants admit that since his initial application and grant of medical staff privileges at SARMC, Dr. Montalbano has had his privileges at Saint Alphonsus Regional Medical Center ("SARMC"), but denies such privileges were renewed on a regular basis. Rather, Dr. Montalbano frequently received shortened appointments due to numerous instances of disruptive behavior. Defendants further admit Dr. Montalbano was presented, or

otherwise had available to him, SARMC's governing Bylaws and Medical Staff Policies and Plans ("MSPP"). Defendants deny the remaining allegations in paragraph 7 of the Amended Complaint.

8. Defendants admit SARMC offers multidisciplinary management of certain spine issues. Defendants deny the remaining allegations in paragraph 8 of the Amended Complaint.

9. Defendants deny the allegations in paragraph 9 of the Amended Complaint.

10. Defendants deny the allegations in paragraph 10 of the Amended Complaint.

11. Defendants admit the allegations in paragraph 11 of the Amended Complaint.

12. Defendants admit several employees filed Q-stim reports regarding Dr. Montalbano's disruptive behavior on March 31, 2008. Defendants deny the remaining allegations in paragraph 12 of the Amended Complaint.

13. Defendants admit that Chapter X, Section 4 of the MSPP provides that Q-stim reports will be forwarded to the Event Report Triage Committee, which will review and triage them consistent with the guidelines in this policy. Defendants deny the remaining allegations in paragraph 13 of the Amended Complaint.

14. Defendants admit the Q-stim triage committee reviewed the Q-stim reports filed by several persons and referred them to the Physician Practice Committee ("PPPC") for evaluation. Defendants deny the remaining allegations in paragraph 14 of the Amended Complaint.

15. Defendants deny the allegations in paragraph 15 of the Amended Complaint.

16. Defendants deny the allegations in paragraph 16 of the Amended Complaint.

17. Defendants admit on or about April 28, 2008, the MEC voted to appoint a three-person panel of physicians to serve as the Ad Hoc Committee. Defendants admit the Ad Hoc Committee was charged with reviewing concerns regarding Dr. Montalbano's behavior with regard to the March 31, 2008 incident, as well as in the context of prior findings that Dr. Montalbano had engaged in disruptive behavior on multiple occasions. Defendants admit that the Ad Hoc Committee interviewed the numerous hospital staff involved in the circumstances created by Dr. Montalbano's disruptive behavior on March 31, 2008. Defendants deny the remaining allegations in paragraph 17 of the Amended Complaint.

18. Defendants deny the allegations in paragraph 18 of the Amended Complaint.

19. Defendants deny the allegations in paragraph 19 of the Amended Complaint.

20. Defendants deny the allegations in paragraph 20 of the Amended Complaint.

21. Defendants admit Dr. Montalbano sent a letter on or about June 24, 2008 regarding his position alleging breach of confidentiality by Dr. Zimmerman. Defendants deny the remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendants admit Dr. Fox responded to Dr. Montalbano's letter of June 24, 2008. The document speaks for itself. Defendants deny the remaining allegations in paragraph 22 of the Amended Complaint.

23. Defendants admit Dr. Montalbano sent a letter to Dr. Fox, Ms. Bruce, SARMC's PPPC Committee, and SARMC's Office of Medical Affairs on or about August 6, 2008. The document speaks for itself. Defendants deny the remaining allegations in this paragraph 23 of the Amended Complaint.

24. Defendants admit that on or about August 25, 2008, the Ad Hoc Committee presented its findings to the MEC and recommended a 90 day suspension. Specifically, the Ad Hoc Committee concluded:

The Committee considered all available documents pertaining to Dr. 572's [Montalbano's] behavioral issues, statements by interviewees and previously unsuccessful collegial attempts to address his behavior. As a result, the Committee is of the opinion that Dr. 572 [Montalbano] engaged in significant Disruptive Conduct as defined in the Policy and Plans Manual of the Medical Staff Bylaws, Chapter X, Section 2.B. that have caused serious potential safety concerns.

Defendants deny the remaining allegations in paragraph 24 of the Amended Complaint.

25. Defendants admit on or about August 25, 2008, the MEC voted to approve the Ad Hoc Committee's recommendation of a 90 day suspension. Defendants deny the remaining allegations in paragraph 25 of the Amended Complaint.

26. Defendants deny the allegations in paragraph 26 of the Amended Complaint.

27. Defendants deny the allegations in paragraph 27 of the Amended Complaint.

28. Defendants admit Dr. Zimmerman was not a member of the MEC or the Ad Hoc Committee investigating Dr. Montalbano. Defendants deny the remaining allegations in paragraph 28 of the Amended Complaint.

29. Defendants admit the allegations in paragraph 29 of the Amended Complaint.

30. Defendants admit that on or about December 2, 2008, Dr. Montalbano sent a letter to Dr. David Gough regarding Dr. Zimmerman. The document speaks for itself. Defendants deny the remaining allegations in paragraph 30 of the Amended Complaint.

31. Defendants admit that on or about December 2, 2008, Dr. Montalbano sent a letter to Dr. David Gough regarding Dr. Fox. The document speaks for itself. Defendants deny the remaining allegations in paragraph 31 of the Amended Complaint.

32. Defendants admit that on or about December 18, 2008, Dr. Kevin Clifford, chairman of the PPPC, issued a precautionary suspension of privileges upon Dr. Montalbano. Defendants deny the remaining allegations paragraph 32 of the Amended Complaint.

33. Defendants admit that on or about December 23, 2008, Dr. Gough, on behalf of the MEC, sent a letter to Dr. Montalbano regarding the status of his suspension. The document speaks for itself. Defendants deny the remaining allegations in paragraph 33 of the Amended Complaint.

34. Defendants admit that on or about December 30, 2008, Dr. Clifford sent Dr. Montalbano a letter. The document speaks for itself. Defendants deny the remaining allegations in paragraph 34 of the Amended Complaint.

35. Defendants deny the allegations in paragraph 35 of the Amended Complaint.

36. Defendants admit on or about January 5, 2009, the Ad Hoc Committee met to review and investigate Dr. Montalbano's complaints. Defendants deny the remaining allegations in paragraph 36 of the Amended Complaint.

37. Defendants admit on or about January 14, 2009, the Ad Hoc Committee reported its conclusions regarding Dr. Montalbano's complaints. Specifically the Ad Hoc Committee concluded:

The Committee considered all available resources pertaining to Dr. 572's [Montalbano's] complaints against Drs. Fox, Zimmerman and Binion. After deliberation of its findings, the Committee believes Dr. 572's [Montalbano's] complaints were filed in retaliation and violate the No Retaliation Policy as

defined in the Policy and Plans Manual of the Medical Staff Bylaws, Chapter X, Section 9. It is the opinion of the Committee that by filing numerous complaints against providers that could not be substantiated, Dr. 572 [Montalbano] has negatively affected the continued effective operation of the Hospital. Additionally, Dr. 572's [Montalbano's] actions could have caused serious quality of care and safety concerns by compromising the collegiality of physicians entrusted to practice in an interdisciplinary care setting.

Defendants deny the remaining allegations in paragraph 37 of the Amended Complaint.

38. Defendants deny the allegations in paragraph 38 of the Amended Complaint.

39. Defendants deny the allegations in paragraph 39 of the Amended Complaint.

40. Defendants deny the allegations in paragraph 40 of the Amended Complaint.

41. Defendants deny the allegations in paragraph 41 of the Amended Complaint.

42. Defendants admit the Hon. Gerald F. Schroeder presided over a Fair Hearing Panel constituted under the Saint Alphonsus Medical Staff Fair Hearing Plan, which Panel consisted of Dr. Jon Wagnild, Dr. Joseph H. Williams, and Karl Kurtz. The Fair Hearing occurred on February 16 and 17, 2009. Defendants deny that the Fair Hearing was "on the Parks' Q-statim." Under the MSPP, Dr. Montalbano was entitled to the Fair Hearing by reason of the fact that the Medical Executive Committee had recommended his medical staff privileges be suspended for a period of in excess of 14 days (here, the recommendation was for a 90-day suspension). Defendants further admit sworn testimony was taken from a number of witnesses, including those called by Dr. Montalbano. The MEC did not, however, call Sherry Parks as a witness at the Fair Hearing. Dr. Montalbano, however, did call Ms. Parks to testify and solicited the testimony he now claims was inconsistent with the testimony of other witnesses. If Plaintiff had not called Ms. Parks as a witness at the Fair Hearing, the testimony he alleges is false would



not have been before the Hearing Panel. Defendants deny the remaining allegations in paragraph 42 of the Amended Complaint.

43. Defendants deny the allegations in paragraph 43 of the Amended Complaint.

44. Defendants admit the Fair Hearing Panel, based on the evidence submitted at the Fair Hearing, upheld the 90-day suspension recommendation of the MEC. Defendants deny the remaining allegations in paragraph 44 of the Amended Complaint.

45. Defendants deny the allegations in paragraph 45 of the Amended Complaint.

46. Defendants admit the allegations in paragraph 46 of the Amended Complaint.

47. Defendants admit that on or about June 10, 2009, the appellate review panel, having concluded the MEC's recommendation of March 30, 2009 was supported by evidence and not arbitrary, capricious, or made with prejudice, upheld the MEC's recommendation that Dr. Montalbano be suspended for 90 days, which the Board of Trustees adopted as final on or about June 19, 2009. Defendants deny the remaining allegations in paragraph 47 of the Amended Complaint.

48. Defendants deny the allegations in paragraph 48 of the Amended Complaint.

49. Defendants admit that pursuant to law, SARMC has reported Dr. Montalbano's suspension to the National Practitioner Data Bank. Defendants deny the remaining allegations in paragraph 49 of the Amended Complaint.

50. Defendants deny the allegations in paragraph 50 of the Amended Complaint.

**FIRST CAUSE OF ACTION**  
**Civil Conspiracy**

51. Defendants incorporate their responses to paragraphs 1 through 50 of the Amended Complaint as if set forth fully herein.

52. Defendants deny the allegations in paragraph 52 of the Amended Complaint, including all sub-paragraphs, of the Amended Complaint.

53. Defendants deny the allegations in paragraph 53 of the Amended Complaint.

54. Defendants deny the allegations in paragraph 54 of the Amended Complaint.

55. Defendants deny the allegations in paragraph 55 of the Amended Complaint.

**SECOND CAUSE OF ACTION**  
**Breach of Covenant of**  
**Good Faith and Fair Dealing**

56. Defendants incorporate their responses to paragraphs 1 through 55 of the Amended Complaint as if set forth fully herein.

57. Defendants deny the allegations in paragraph 57 of the Amended Complaint.

58. Defendants deny the allegations in paragraph 58 of the Amended Complaint.

59. Defendants deny the allegations in paragraph 59 of the Amended Complaint.

60. Defendants deny the allegations in paragraph 60 of the Amended Complaint.

61. Defendants deny the allegations in paragraph 61 of the Amended Complaint.

62. Defendants deny the allegations in paragraph 62 of the Amended Complaint.

63. Defendants deny the allegations in paragraph 63 of the Amended Complaint.

64. Defendants deny the allegations in paragraph 64 of the Amended Complaint.

65. Defendants deny the allegations in paragraph 65 of the Amended Complaint.

66. Defendants deny the allegations in paragraph 66 of the Amended Complaint.

67. Defendants deny the allegations in paragraph 67 of the Amended Complaint.

68. Defendants deny the allegations in paragraph 68 of the Amended Complaint.

**THIRD CAUSE OF ACTION**  
**Intentional and/or Negligent**  
**Interference with Economic Advantage**

69. Defendants incorporate their responses to paragraphs 1 through 68 of the Amended Complaint as if set forth fully herein.

70. Defendants deny the allegations in paragraph 70 of the Amended Complaint.

71. Defendants deny the allegations in paragraph 71 of the Amended Complaint.

72. Defendants deny the allegations in paragraph 72 of the Amended Complaint.

73. Defendants deny the allegations in paragraph 73 of the Amended Complaint.

74. Defendants deny the allegations in paragraph 74 of the Amended Complaint.

**FOURTH CAUSE OF ACTION**  
**Interference with Prospective**  
**Contractual Relations or Business Expectations**

75. Defendants incorporate their responses to paragraphs 1 through 74 of the Amended Complaint as if set forth fully herein.

76. Defendants deny the allegations in paragraph 76 of the Amended Complaint.

77. Defendants deny the allegations in paragraph 77 of the Amended Complaint.

78. Defendants deny the allegations in paragraph 78 of the Amended Complaint.

**FIFTH CAUSE OF ACTION**  
**Defamation *Per Se*, Libel *Per Se*, and Slander *Per Se***

79. Defendants incorporate their responses to paragraphs 1 through 78 of the Amended Complaint as if set forth fully herein.

80. Defendants deny the allegations in paragraph 80 of the Amended Complaint.

81. Defendants deny the allegations in paragraph 81 of the Amended Complaint.

82. Defendants deny the allegations in paragraph 82 of the Amended Complaint.

83. Defendants deny the allegations in paragraph 83 of the Amended Complaint.

84. Defendants deny the allegations in paragraph 84 of the Amended Complaint.

85. Defendants deny the allegations in paragraph 85 of the Amended Complaint.

86. Defendants deny the allegations in paragraph 86 of the Amended Complaint.

**SIXTH CAUSE OF ACTION**  
**Denial of Common Law Fair Procedure Rights**

87. Defendants incorporate their responses to paragraphs 1 through 86 of the Amended Complaint as if set forth fully herein.

88. Defendants deny the allegations in paragraph 88 of the Amended Complaint.

89. Defendants deny the allegations in paragraph 89 of the Amended Complaint.

90. Defendants deny the allegations in paragraph 90 of the Amended Complaint.

91. Defendants deny the allegations in paragraph 91 of the Amended Complaint.

**SEVENTH CAUSE OF ACTION**  
**Breach of Fiduciary Duties**

92. Defendants incorporate their responses to paragraphs 1 through 91 of the Amended Complaint as if set forth fully herein.

93. Defendants deny the allegations in paragraph 93 of the Amended Complaint.

94. Defendants deny the allegations in paragraph 94 of the Amended Complaint.

95. Defendants deny the allegations in paragraph 95 of the Amended Complaint.

**EIGHTH CAUSE OF ACTION**  
**Violation of Due Process Rights**

96. Defendants incorporate their responses to paragraphs 1 through 95 of the Amended Complaint as if set forth fully herein.

97. Defendants deny the allegations in paragraph 97 of the Amended Complaint.

98. Defendants deny the allegations in paragraph 98 of the Amended Complaint.
99. Defendants deny the allegations in paragraph 99 of the Amended Complaint.
100. Defendants deny the allegations in paragraph 100 of the Amended Complaint.
101. Defendants deny the allegations in paragraph 101 of the Amended Complaint.
102. Defendants deny the allegations in paragraph 102 of the Amended Complaint.

**NINTH CAUSE OF ACTION**  
**Intentional and/or Negligent Infliction of Emotional Distress**

103. Defendants incorporate their responses to paragraphs 1 through 102 of the Amended Complaint as if set forth fully herein.

104. Defendants deny the allegations in paragraph 104 of the Amended Complaint.
105. Defendants deny the allegations in paragraph 105 of the Amended Complaint.
106. Defendants deny the allegations in paragraph 106 of the Amended Complaint.
107. Defendants deny the allegations in paragraph 107 of the Amended Complaint.

**TENTH CAUSE OF ACTION**  
**Injunctive Relief**

108. Defendants incorporate their responses to paragraphs 1 through 107 of the Amended Complaint as if set forth fully herein.

109. Defendants deny the allegations in paragraph 109 of the Amended Complaint.
110. Defendants deny the allegations in paragraph 110 of the Amended Complaint.

**DEFENSES**

111. Defendant denies each and every allegation of Plaintiff's Amended Complaint not admitted above.

112. Plaintiff's Amended Complaint, and each of the counts asserted against Defendants, fails to state a claim upon which relief can be granted against Defendants.

113. Plaintiff's Amended Complaint, and each of the counts asserted against Defendants, was made without good cause, and without any basis in law or fact.

114. Defendants are immune from the claims asserted by plaintiff under federal and state law. Specifically, and without limitation, the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101, *et. seq.*, and Idaho Code §§ 39-1392c, provide Defendants with immunity from the claims asserted by plaintiff in this action.

115. Damages suffered by Plaintiffs, if any, were caused by the Plaintiff's own fault or negligence.

116. Defendants are not the proximate cause of any damage suffered by Plaintiffs.

117. Communications by Defendants concerning Plaintiff, if any, were privileged.

118. Communications by Defendants concerning Plaintiff, if any, were true.

119. Defendants' conduct is privileged under both state and federal law.

120. Plaintiff has unclean hands.

121. Damages suffered by Plaintiff, if any, were caused by or contributed to by the superseding and unexpected acts and conduct of other persons and entities.

122. Plaintiff's alleged injuries and/or damages may be the result of actions or inaction of other persons or entities over whom Defendants have no control and no responsibility. To the extent the evidence reveals the same, Plaintiff's recovery, if any, must be proportionately reduced and/or barred.

123. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

124. Plaintiff has released his claims in whole or in part.
125. Plaintiff's claims are moot in whole or in part.
126. Plaintiff's claims are barred by the doctrine of invited error.
127. Plaintiff is estopped to allege the existence of procedural deficiencies to which he did not object.
128. Defendants reserve the right to assert additional defenses based upon further investigation and discovery.

#### **PRAYER**

Wherefore, Defendants pray for judgment against Plaintiff as follows:

1. For judgment in their favor on all counts of Plaintiff's Amended Complaint;
2. For an award of costs and attorneys' fees to the full extent permitted by law, including Idaho Code § 12-121; and
3. For such other and further relief as this Court may deem just in the premises.

#### **DEMAND FOR JURY TRIAL**

Defendants hereby demand a trial by a jury of not less than twelve (12) on all issues so triable pursuant to I.R.C.P. 38(b).

DATED this 8<sup>th</sup> day of September 2009.



Robert B. White  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of September 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Raymond D. Powers  
Powers Thomson, P.C.  
345 Bobwhite Court, Ste #150  
P.O. Box 9756  
Boise, ID 83707

☐ Hand Delivery  
☒ Facsimile (208) 577-5101  
☐ Overnight Courier  
☒ U.S. Mail

*R. White*

Robert B. White



NO. \_\_\_\_\_ FILED \_\_\_\_\_ 4:30  
AM. \_\_\_\_\_ PM. \_\_\_\_\_

SEP 08 2009

J. DAVID NAVARRO, Clerk  
By KATHY J. BIEHL  
DEPUTY

Robert B. White (ISB #4438)  
J. Will Varin (ISB #6981)  
Givens Pursley LLP  
601 W. Bannock Street  
PO Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
rbw@givenspursley.com  
willvarin@givenspursley.com

Attorneys for Defendants Saint Alphonsus Medical Center,  
Sherry Parks, and Dr. Fox

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.	)	
	)	
Plaintiff,	)	No. CV OC 0914805
	)	
v.	)	<b>ANSWER OF DEFENDANT SHERRY</b>
	)	<b>PARKS TO PLAINTIFF'S AMENDED</b>
SAINT ALPHONSUS REGIONAL	)	<b>COMPLAINT</b>
MEDICAL CENTER; SHERRY PARKS;	)	
CHRISTIAN G. ZIMMERMAN, M.D.;	)	Filing Fee: \$58.00
and DONALD FOX, M.D.,	)	
	)	
Defendants.	)	
	)	

COMES NOW Defendant Sherry Parks ("Defendant"), by and through her attorneys of record, Givens Pursley LLP, and answering Plaintiff's Amended Complaint and Demand for Jury Trial ("Amended Complaint") on file herein, admits, denies and alleges as follows:

## **JURISDICTION AND PARTIES**

1. Defendant admits the allegations in paragraph 1 of the Amended Complaint.
2. Defendant admits the allegations in paragraph 2 of the Amended Complaint.
3. Defendant admits the allegations in paragraph 3 of the Amended Complaint.
4. Defendant admits Christian G. Zimmerman, M.D. ("Dr. Zimmerman") is an Idaho resident licensed and practicing medicine in the state of Idaho, and is a neurosurgeon. Defendant is without sufficient information to admit or deny the remaining allegations in paragraph 4 of the Amended Complaint and, therefore, denies the same.
5. Defendant admits Donald Fox, M.D. ("Dr. Fox") is an Idaho resident licensed and practicing medicine in the state of Idaho, and his specialty is anesthesia. Defendant is without sufficient information to admit or deny the remainder of the allegations in paragraph 5 of the Amended Complaint and, therefore, denies the same.
6. Defendant admits the jurisdiction and venue are proper in this Court under Idaho Code § 5-404.

## **FACTS**

7. Defendant is without sufficient information to either admit or deny the allegations of paragraph 7 of the Amended Complaint and, therefore, denies them.
8. Defendant admits Saint Alphonsus Regional Medical Center offers multidisciplinary management of certain spine issues. Defendant denies the remaining allegations in paragraph 8 of the Amended Complaint.
9. Defendant is without sufficient information to either admit or deny the allegations of paragraph 9 of the Amended Complaint and, therefore, denies them.

10. Defendant is without sufficient information to either admit or deny the allegations of paragraph 10 of the Amended Complaint and, therefore, denies them.

11. Defendant admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant admits she filed a Q-statement report regarding Dr. Montalbano's behavior on or about March 31, 2008. Defendant denies the remaining allegations in paragraph 12 of the Amended Complaint.

13. Defendant is without sufficient information to either admit or deny the allegations of paragraph 13 of the Amended Complaint and, therefore, denies them.

14. Defendant is without sufficient information to either admit or deny the allegations of paragraph 14 of the Amended Complaint and, therefore, denies them.

15. Defendant is without sufficient information to either admit or deny the allegations of paragraph 15 of the Amended Complaint and, therefore, denies them.

16. Defendant is without sufficient information to either admit or deny the allegations of paragraph 16 of the Amended Complaint and, therefore, denies them.

17. Defendant admits she was interviewed by an Ad Hoc Committee regarding Dr. Montalbano's behavior on March 31, 2008. Defendant is without sufficient information to either admit or deny the remaining allegations in paragraph 17 of the Amended Complaint and, therefore, denies them.

18. Defendant is without sufficient information to either admit or deny the allegations of paragraph 18 of the Amended Complaint and, therefore, denies them.

19. Defendant is without sufficient information to either admit or deny the allegations of paragraph 19 of the Amended Complaint and, therefore, denies them.

20. Defendant is without sufficient information to either admit or deny the allegations of paragraph 20 of the Amended Complaint and, therefore, denies them.

21. Defendant is without sufficient information to either admit or deny the allegations of paragraph 21 of the Amended Complaint and, therefore, denies them.

22. Defendant is without sufficient information to either admit or deny the allegations of paragraph 22 of the Amended Complaint and, therefore, denies them.

23. Defendant is without sufficient information to either admit or deny the allegations of paragraph 23 of the Amended Complaint and, therefore, denies them.

24. Defendant denies the Q-statism report she and another Saint Alphonsus employee filed was not credible. Defendant is without sufficient information to either admit or deny the remainder of the allegations of paragraph 24 of the Amended Complaint and, therefore, denies them.

25. Defendant denies the existence of false information in the Q-statism she and another Saint Alphonsus employee filed. Defendant is without sufficient information to either admit or deny the remainder of the allegations of paragraph 25 of the Amended Complaint and, therefore, denies them.

26. Defendant is without sufficient information to either admit or deny the allegations of paragraph 26 of the Amended Complaint and, therefore, denies them.

27. Defendant is without sufficient information to either admit or deny the allegations of paragraph 27 of the Amended Complaint and, therefore, denies them.

28. Defendant is without sufficient information to either admit or deny the allegations of paragraph 28 of the Amended Complaint and, therefore, denies them.

29. Defendant is without sufficient information to either admit or deny the allegations of paragraph 29 of the Amended Complaint and, therefore, denies them.

30. Defendant is without sufficient information to either admit or deny the allegations of paragraph 30 of the Amended Complaint and, therefore, denies them.

31. Defendant is without sufficient information to either admit or deny the allegations of paragraph 31 of the Amended Complaint and, therefore, denies them.

32. Defendant is without sufficient information to either admit or deny the allegations of paragraph 32 of the Amended Complaint and, therefore, denies them.

33. Defendant is without sufficient information to either admit or deny the allegations of paragraph 33 of the Amended Complaint and, therefore, denies them.

34. Defendant is without sufficient information to either admit or deny the allegations of paragraph 34 of the Amended Complaint and, therefore, denies them.

35. Defendant is without sufficient information to either admit or deny the allegations of paragraph 35 of the Amended Complaint and, therefore, denies them.

36. Defendant is without sufficient information to either admit or deny the allegations of paragraph 36 of the Amended Complaint and, therefore, denies them.

37. Defendant is without sufficient information to either admit or deny the allegations of paragraph 37 of the Amended Complaint and, therefore, denies them.

38. Defendant is without sufficient information to either admit or deny the allegations of paragraph 38 of the Amended Complaint and, therefore, denies them.

39. Defendant is without sufficient information to either admit or deny the allegations of paragraph 39 of the Amended Complaint and, therefore, denies them.

40. Defendant is without sufficient information to either admit or deny the allegations of paragraph 40 of the Amended Complaint and, therefore, denies them.

41. Defendant is without sufficient information to either admit or deny the allegations of paragraph 41 of the Amended Complaint and, therefore, denies them.

42. Defendant admits that Dr. Montalbano's attorney called her to testify at the February 16 and 17, 2009 Fair Hearing Panel hearing. Defendant is without sufficient information to either admit or deny the remaining allegations of paragraph 42 of the Amended Complaint and, therefore, denies them.

43. Defendant denies that her report contained false statements, false accusations, intentional misrepresentations of fact or that it otherwise contained any other uncorroborated evidence. Defendant is without sufficient information to either admit or deny the remaining allegations of paragraph 43 of the Amended Complaint and, therefore, denies them.

44. Defendant is without sufficient information to either admit or deny the allegations of paragraph 44 of the Amended Complaint and, therefore, denies them.

45. Defendant is without sufficient information to either admit or deny the allegations of paragraph 45 of the Amended Complaint and, therefore, denies them.

46. Defendant is without sufficient information to either admit or deny the allegations of paragraph 46 of the Amended Complaint and, therefore, denies them.

47. Defendant is without sufficient information to either admit or deny the allegations of paragraph 47 of the Amended Complaint and, therefore, denies them.

48. Defendant is without sufficient information to either admit or deny the allegations of paragraph 48 of the Amended Complaint and, therefore, denies them.

49. Defendant is without sufficient information to either admit or deny the allegations of paragraph 49 of the Amended Complaint and, therefore, denies them.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint.

**FIRST CAUSE OF ACTION**  
**Civil Conspiracy**

51. Defendant incorporates their responses to paragraphs 1 through 50 of the Amended Complaint as if set forth fully herein.

52. Defendant denies the allegations in paragraph 52 of the Amended Complaint, including all sub-paragraphs, of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint.

54. To the extent the allegations in paragraph 54 of the Amended Complaint reference her, she denies the same. She is without sufficient information to admit or deny the remainder of the allegations contained therein and, therefore, denies the same.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint.

**SECOND CAUSE OF ACTION**  
**Breach of Covenant of**  
**Good Faith and Fair Dealing**

56. Defendant incorporates their responses to paragraphs 1 through 55 of the Amended Complaint as if set forth fully herein.

57. Defendant denies the statement in the subject Q-statim was false. Defendant is without sufficient information to either admit or deny the remainder of the allegations of paragraph 57 of the Amended Complaint and, therefore, denies them.

58. Defendant is without sufficient information to either admit or deny the allegations of paragraph 58 of the Amended Complaint and, therefore, denies them.

59. Defendant is without sufficient information to either admit or deny the allegations of paragraph 59 of the Amended Complaint and, therefore, denies them.

60. Defendant is without sufficient information to either admit or deny the allegations of paragraph 60 of the Amended Complaint and, therefore, denies them.

61. Defendant denies the statement in the subject Q-statement was false. Defendant is without sufficient information to either admit or deny the remainder of the allegations of paragraph 61 of the Amended Complaint and, therefore, denies them.

62. Defendant is without sufficient information to either admit or deny the allegations of paragraph 62 of the Amended Complaint and, therefore, denies them.

63. Defendant is without sufficient information to either admit or deny the allegations of paragraph 63 of the Amended Complaint and, therefore, denies them.

64. Defendant denies the statement in the subject Q-statement was false. Defendant is without sufficient information to either admit or deny the remainder of the allegations of paragraph 64 of the Amended Complaint and, therefore, denies them.

65. Defendant is without sufficient information to either admit or deny the allegations of paragraph 65 of the Amended Complaint and, therefore, denies them.

66. Defendant is without sufficient information to either admit or deny the allegations of paragraph 66 of the Amended Complaint and, therefore, denies them.

67. Defendant is without sufficient information to either admit or deny the allegations of paragraph 67 of the Amended Complaint and, therefore, denies them.

68. Defendant is without sufficient information to either admit or deny the allegations of paragraph 68 of the Amended Complaint and, therefore, denies them.



**THIRD CAUSE OF ACTION**  
**Intentional and/or Negligent**  
**Interference with Economic Advantage**

69. Defendant incorporates their responses to paragraphs 1 through 68 of the Amended Complaint as if set forth fully herein.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant denies the allegations in paragraph 71 of the Amended Complaint.

72. Defendant denies the allegations in paragraph 72 of the Amended Complaint.

73. Defendant denies the allegations in paragraph 73 of the Amended Complaint.

74. Defendant denies the allegations in paragraph 74 of the Amended Complaint.

**FOURTH CAUSE OF ACTION**  
**Interference with Prospective**  
**Contractual Relations or Business Expectations**

75. Defendant incorporates their responses to paragraphs 1 through 74 of the Amended Complaint as if set forth fully herein.

76. Defendant denies the allegations in paragraph 76 of the Amended Complaint.

77. Defendant denies the allegations in paragraph 77 of the Amended Complaint.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

**FIFTH CAUSE OF ACTION**  
**Defamation *Per Se*, Libel *Per Se*, and Slander *Per Se***

79. Defendant incorporates their responses to paragraphs 1 through 78 of the Amended Complaint as if set forth fully herein.

80. Defendant denies the allegations in paragraph 80 of the Amended Complaint.

81. Defendant denies the allegations in paragraph 81 of the Amended Complaint.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant denies the allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant denies the allegations in paragraph 85 of the Amended Complaint.

86. Defendant denies the allegations in paragraph 86 of the Amended Complaint.

**SIXTH CAUSE OF ACTION**  
**Denial of Common Law Fair Procedure Rights**

87. Defendant incorporates their responses to paragraphs 1 through 86 of the Amended Complaint as if set forth fully herein.

88. Defendant is without sufficient information to either admit or deny the allegations of paragraph 88 of the Amended Complaint and, therefore, denies them.

89. Defendant is without sufficient information to either admit or deny the allegations of paragraph 89 of the Amended Complaint and, therefore, denies them.

90. Defendant is without sufficient information to either admit or deny the allegations of paragraph 90 of the Amended Complaint and, therefore, denies them.

91. Defendant denies the allegations in paragraph 91 of the Amended Complaint.

**SEVENTH CAUSE OF ACTION**  
**Breach of Fiduciary Duties**

92. Defendant incorporates their responses to paragraphs 1 through 91 of the Amended Complaint as if set forth fully herein.

93. Defendant denies the allegations in paragraph 93 of the Amended Complaint.

94. Defendant denies the allegations in paragraph 94 of the Amended Complaint.

95. Defendant denies the allegations in paragraph 95 of the Amended Complaint.

**EIGHTH CAUSE OF ACTION**  
**Violation of Due Process Rights**

96. Defendant incorporates their responses to paragraphs 1 through 95 of the Amended Complaint as if set forth fully herein.

97. Defendant is without sufficient information to either admit or deny the allegations of paragraph 97 of the Amended Complaint and, therefore, denies them.

98. Defendant is without sufficient information to either admit or deny the allegations of paragraph 98 of the Amended Complaint and, therefore, denies them.

99. Defendant is without sufficient information to either admit or deny the allegations of paragraph 99 of the Amended Complaint and, therefore, denies them.

100. Defendant is without sufficient information to either admit or deny the allegations of paragraph 100 of the Amended Complaint and, therefore, denies them.

101. Defendant is without sufficient information to either admit or deny the allegations of paragraph 101 of the Amended Complaint and, therefore, denies them.

102. Defendant denies the allegations in paragraph 102 of the Amended Complaint.

**NINTH CAUSE OF ACTION**  
**Intentional and/or Negligent Infliction of Emotional Distress**

103. Defendant incorporates their responses to paragraphs 1 through 102 of the Amended Complaint as if set forth fully herein.

104. Defendant denies the allegations in paragraph 104 of the Amended Complaint.

105. Defendant denies the allegations in paragraph 105 of the Amended Complaint.

106. Defendant denies the allegations in paragraph 106 of the Amended Complaint.

107. Defendant denies the allegations in paragraph 107 of the Amended Complaint.

**TENTH CAUSE OF ACTION**  
**Injunctive Relief**

108. Defendant incorporates their responses to paragraphs 1 through 107 of the Amended Complaint as if set forth fully herein.

109. Defendant denies the allegations in paragraph 109 of the Amended Complaint.

110. Defendant denies the allegations in paragraph 110 of the Amended Complaint.

**DEFENSES**

111. Defendant denies each and every allegation of Plaintiff's Amended Complaint not admitted above.

112. Plaintiff's Amended Complaint, and each of the counts asserted against Defendant, fails to state a claim upon which relief can be granted against Defendant.

113. Plaintiff's Amended Complaint, and each of the counts asserted against Defendant, are made without good cause, and without any basis in law or fact.

114. Defendant is immune from the claims asserted by plaintiff under federal and state law. Specifically, and without limitation, the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101, *et. seq.*, and Idaho Code §§ 39-1392c, provide Defendant with immunity from the claims asserted by Plaintiff in this action.

115. Damages suffered by Plaintiffs, if any, were caused by the Plaintiff's own fault or negligence.

116. Defendant is not the proximate cause of any damage suffered by Plaintiff.

117. Communications by Defendant concerning Plaintiff, if any, were privileged.

118. Communications by Defendant concerning Plaintiff, if any, were true.

119. Defendant's conduct is privileged under both state and federal law.

120. Plaintiff has unclean hands.

121. Damages suffered by Plaintiff, if any, were caused by or contributed to by the superseding and unexpected acts and conduct of other persons and entities.

122. Plaintiff's alleged injuries and/or damages may be the result of actions or inaction of other persons or entities over whom Defendant has no control and no responsibility. To the extent the evidence reveals the same, Plaintiff's recovery, if any, must be proportionately reduced and/or barred.

123. Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

124. Plaintiff has released his claims in whole or in part.

125. Plaintiff's claims are moot in whole or in part.

126. Plaintiff's claims are barred by the doctrine of invited error.

127. Plaintiff is estopped to allege the existence of procedural deficiencies to which he did not object.

128. Defendant reserve the right to assert additional defenses based upon further investigation and discovery.

### **PRAYER**

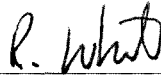
Wherefore, Defendant prays for judgment against Plaintiff as follows:

1. For judgment in her favor on all counts of Plaintiff's Amended Complaint;
2. For an award of costs and attorneys' fees to the full extent permitted by law, including Idaho Code § 12-121; and
3. For such other and further relief as this Court may deem just in the premises.

**DEMAND FOR JURY TRIAL**

Defendant hereby demands a trial by a jury of not less than twelve (12) on all issues so triable pursuant to I.R.C.P. 38(b).

DATED this 8 day of September 2009.



Robert B. White  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8 day of September 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Raymond D. Powers  
Powers Thomson, P.C.  
345 Bobwhite Court, Ste #150  
P.O. Box 9756  
Boise, ID 83707

☐ Hand Delivery  
☒ Facsimile (208) 577-5101  
☐ Overnight Courier  
☒ U.S. Mail



Robert B. White

Andrew C. Brassey, ISB No. 2128  
Bradley S. Richardson, ISB No. 7008  
BRASSEY, WETHEREL & CRAWFORD, LLP  
203 W. Main Street  
P.O. Box 1009  
Boise, Idaho 83701-1009  
Telephone: (208) 344-7300  
Facsimile: (208) 344-7077

Attorneys for Christian G. Zimmerman, M.D.

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 441

OCT 05 2008

J. DAVID NAVAHO, Clerk  
By A. GARDEN  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**ANSWER TO AMENDED  
COMPLAINT AND DEMAND FOR  
JURY TRIAL**

ORIGINAL

COMES NOW, Defendant Christian G. Zimmerman, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, and answers Plaintiff's Amended Complaint and Demand for Jury Trial as follows:

**FIRST DEFENSE**

Plaintiff's Amended Complaint fails to state a claim against this Defendant upon which relief may be granted.



## **SECOND DEFENSE**

Defendant denies each and every allegation contained in Plaintiff's Amended Complaint not herein expressly and specifically admitted. Specifically, in addition to those denials set forth below, Defendant denies the allegations contained in paragraphs 9, 19, 20, 26, 27, 50, 52 (and all its subparts), 53, 54, 55, 62, 70, 71, 73, 74, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 94, 95, 104, 105, 106, 107 and 109. In addition, Defendant is without knowledge as to the truth or veracity of many of the allegations contained in the Amended Complaint and, therefore, denies the allegations contained in paragraphs 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 72, 93, 97, 98, 99, 100, 101, 102 and 110. To the extent necessary, Defendant denies the allegations set forth in paragraphs 51, 56, 69, 75, 79, 87, 92, 96, 103 and 108.

### **II.**

A. Defendant admits he is an Idaho resident, licensed and practicing medicine in the State of Idaho and that he is a neurosurgeon whose specialty includes the practice of spine surgery.

B. Based upon information and belief, Defendant admits Donald Fox is an Idaho resident licensed and practicing medicine in the State of Idaho and his specialty is anesthesia.

C. Defendant admits Paul J. Montalbano, M.D. is an Idaho resident and neurosurgeon licensed and practicing medicine in the State of Idaho.

D. Defendant admits Saint Alphonsus Regional Medical Center is a non-profit corporation conducting business and providing medical services to the general public in the State of Idaho.

E. Based on information and belief, Defendant admits that Sherry Parks is an Idaho resident and at all times relevant was an employee of Saint Alphonsus Regional Medical Center.

F. Defendant admits jurisdiction and venue are proper in this Court under Idaho Code § 5-404.

G. Defendant admits Saint Alphonsus Regional Medical Center offers multi-disciplinary management of certain spine issues. Defendant denies the remaining allegations of paragraph 8.

G. Defendant admits the allegations contained in paragraph 28.

H. Defendant admits that Dr. Montalbano filed a formal Qstatim report against this Defendant. This Defendant denies the remainder of paragraph 30.

### **THIRD DEFENSE**

Plaintiff has failed to mitigate damages, if any. By asserting this defense, Defendant does not admit that the Plaintiff has been damaged.

### **FOURTH DEFENSE**

Plaintiff has waived or is estopped from asserting the causes of action set forth in his Amended Complaint.

### **FIFTH DEFENSE**

The injuries and damages sustained by Plaintiff, if any, were proximately caused by the intervening, superceding negligence of third parties who are not parties to this suit. By asserting this defense, Defendant does not admit that the Plaintiff has been damaged.

### **SIXTH DEFENSE**

The damages and injuries sustained by Plaintiff, if any, were proximately caused by the actions of persons or entities other than this answering Defendant whom Defendant does not control, and over whom Defendant had no control. By asserting this defense, this answering Defendant does not admit that Plaintiff has been damaged.

**SEVENTH DEFENSE**

Plaintiff was guilty of negligence in connection with the matters and damages alleged, which proximately caused and/or contributed to Plaintiff's injuries and damages, if any.

**EIGHTH DEFENSE**

Subject to and without waiving any other defense, Defendant is immune from the claims asserted by Plaintiff under federal and state law. This includes, without limitation, the Health Care Quality Improvement Act of 1986, found at 42 USC § 11101, et seq., and Idaho Code § 39-1392c, which provide Defendant with immunity from claims asserted by Plaintiff in this action.

**NINTH DEFENSE**

Communications by Defendant concerning Plaintiff, if any, were true and/or privileged.

**TENTH DEFENSE**

Plaintiff has unclean hands.

**ELEVENTH DEFENSE**

Plaintiff has released his claims in whole or in part.

**TWELFTH DEFENSE**

Plaintiff is estopped to allege the existence of procedural deficiencies to which he did not object.

**THIRTEENTH DEFENSE**

There was no contract, or privity of contract, between Plaintiff and Defendant.

**FOURTEENTH DEFENSE**

There was no plan or agreement by or among Defendants to defraud Plaintiff.

**FIFTEENTH DEFENSE**

The alleged conduct by Defendants does not expose Plaintiff to public hatred, contempt or disgrace. By asserting this defense, Defendant does not admit that the Plaintiff has been damaged.

**SIXTEENTH DEFENSE**

Plaintiff's claims are barred by the doctrine of invited error.

**SEVENTEENTH DEFENSE**

There is exists no causation or proximate causation between any alleged act or alleged breach of duty by this answering Defendant and Plaintiff's alleged injuries and damages.

**EIGHTEENTH DEFENSE**

Discovery is ongoing in this matter and because of such ongoing discovery, this answering Defendant respectfully reserves the right to amend and/or supplement this Answer to Amended Complaint and Demand for Jury Trial.

WHEREFORE, Defendant prays for judgment against Plaintiff as follows:

1. That Plaintiff take nothing by this Complaint;
2. That the Complaint in this matter be dismissed with prejudice;
3. That Defendant be awarded costs expended in this matter;
4. That Defendant be awarded attorney fees pursuant to the Idaho Rules of Civil Procedure, and the statutes of the state of Idaho including I.C. §12-120 and §12-121; and
5. For such other and further relief as the court may deem just.

**DEMAND FOR JURY TRIAL**

Defendant demands a trial by jury, composed of no less than twelve (12) persons, on all issues, claims and defenses so triable, pursuant to the constitutions and laws of the United States and the state of Idaho.

DATED this 9<sup>th</sup> day of October, 2009.

BRASSEY, WETHERELL & CRAWFORD, LLP

By 

Andrew C. Brassey, Of the Firm  
Attorneys for Christian G. Zimmerman, M.D.

**CERTIFICATE OF SERVICE**

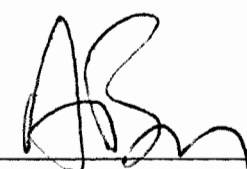
I HEREBY CERTIFY that on this 9<sup>th</sup> day of October, 2009, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Raymond Powers  
Powers Thomson, P.C.  
345 Bobwhite Court, Suite 150  
P O Box 9756  
Boise, ID 83707

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☐ Hand-Delivered  
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Robert B. White  
J. Will Varin  
Givens Pursley LLP  
601 W. Bannock Street  
P.O. Box 2720  
Boise, Idaho 83701-2720

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☐ Facsimile (208) 388-1300

  
\_\_\_\_\_  
Andrew C. Brassey

ORIGINAL

NO. \_\_\_\_\_ FILED 413  
A.M. \_\_\_\_\_ P.M.

JAN 20 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

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Portia L. Rauer  
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345 Bobwhite Court, Suite 150  
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Telephone: (208) 577-5100  
Facsimile: (208) 577-5101  
W:\19\19-003\MTC Wrongful Suspension - Mot.docx

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**PLAINTIFF'S MOTION TO  
COMPEL PRODUCTION OF  
INFORMATION RELATED TO  
SARMC'S WRONGFUL  
SUSPENSION OF DR.  
MONTALBANO'S PRIVILEGES**


**COMES NOW**, Plaintiff PAUL J. MONTALBANO, M.D. (Dr. Montalbano), by and through his attorneys of record, POWERS TOLMAN, PLLC, and, pursuant to Rule 37(a)(2), Idaho Rules of Civil Procedure, respectfully moves this Court for an order compelling production of information related to St. Alphonsus Regional Medical Center's (SARMC)

wrongful suspension of Dr. Montalbano's privileges at SARMC and overruling the peer review privilege and immunity objections asserted by SARMC. Specifically, Dr. Montalbano moves this Court for an order that 1) the peer review privilege in Idaho Code Section 39-1392b is inapplicable, 2) the immunity in Idaho Code Section 39-1392c is inapplicable, 3) prohibits SARMC, absent exceptional circumstances, from raising peer review privilege and immunity objections in further discovery, and 4) compels SARMC to produce the information Dr. Montalbano has requested in his interrogatory nos. 1, 3-5, 10, 11, 13-24; requests for production nos. 1, 2, 4, 5, 7-33; and request for admissions nos. 17-33, 37-39, 45-100, 102-05, 107-09, 111-15, 117-18 to which SARMC has objected, but has not fully responded asserting peer review privilege and immunity objections.

This motion is supported by the memorandum and affidavit filed contemporaneously herewith.

DATED this 20<sup>th</sup> day of January, 2010.

POWERS TOLMAN, PLLC

By   
Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of January, 2010, I caused to be served a true copy of the foregoing **PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF INFORMATION RELATED TO SARMC'S WRONGFUL SUSPENSION OF DR. MONTALBANO'S PRIVILEGES**, by the method indicated below, and addressed to each of the following:

Robert B. White  
Givens Pursley LLP  
601 W. Bannock Street  
PO Box 2720  
Boise, ID 83701-2720  
Fax: 388-1300

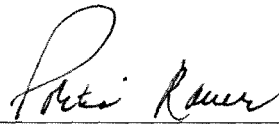
*Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks and  
Donald Fox, M.D.*

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy

Andrew C. Brassey  
Bradley S. Richardson  
Brassey, Wetherell & Crawford, LLP  
203 W. Main Street  
PO Box 1009  
Boise, ID 83701-1009  
Fax: 344-7077

*Attorneys for Defendant Christian G.  
Zimmerman, M.D.*

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☒ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy



\_\_\_\_\_  
Raymond D. Powers  
Portia L. Rauer



ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 413

JAN 20 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

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W:\19\19-003\MTC Wrongful Suspension - Appendix.docx

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**APPENDIX IN SUPPORT OF  
PLAINTIFF'S MOTION TO  
COMPEL PRODUCTION OF  
INFORMATION RELATED TO  
SARMC'S WRONGFUL  
SUSPENSION OF DR.  
MONTALBANO'S PRIVILEGES**

**COMES NOW**, Plaintiff PAUL J. MONTALBANO, M.D. (Dr. Montalbano), by and through his attorneys of record, POWERS TOLMAN, PLLC, and submits this appendix in support of his motion to compel production of information surrounding St. Alphonsus Regional Medical Center's (SARMC) wrongful suspension of Dr. Montalbano's privileges to the SARMC

medical staff. This appendix contains definitions of key terms specific to the issues in this case and an overview of the pertinent Bylaws and Medical Staff Policy and Plans (MSPP). This appendix has been provided to give the Court additional context for the background information and argument set forth in plaintiff's memorandum in support of his motion to compel. The information that follows is not intended to be comprehensive, but is provided only to give a brief explanation to assist the Court.<sup>1</sup>

A. **DEFINITIONS - Generally.**

- **SARMC Bylaws** – govern the relationship between the hospital and members of the medical staff.
- **SARMC Medical Staff Policy and Plans (MSPP)** – govern the process related to medical staff discipline and are part of the SARMC's Bylaws.
- **Privileges** – permission by a health care facility to a physician to provide medical care service at said facility for a certain length of time. Grant of privileges results in appointment to the medical staff.
- **Medical Executive Committee (MEC)** – organizational body comprised of members of the medical staff to represent and act on behalf of all physicians on the medical staff.
- **Corrective Action Plan** – an investigation of a physician which could result in an adverse recommendation affecting a physician's privileges.
- **Ad hoc committee** – a committee appointed by the MEC if the MEC cannot make a determination on its own or believes a matter should be investigated further under the corrective action plan.
- **Parks Qstatim Report** – the Qstatim report filed on April 1, 2008, by Sherry Parks alleging that Dr. Montalbano exhibited disruptive conduct in a telephone conversation between Dr. Montalbano and Jeanne Parker with regard to Patient X.
- **Original Ad Hoc Committee** – committee of three physicians (Drs. Cushman, Austin, and Mallea) appointed in April of 2008 to further investigate the Parks Qstatim report to determine whether Dr. Montalbano exhibited disruptive conduct in violation of the Medical Staff Policy and Plans.
- **Physician Professional Practice Committee (PPPC)** – seven member standing committee whose duties are confined to assisting medical staff leadership with functions of the Disruptive Conduct Policy.
- **Montalbano Qstatim Reports** – Qstatim reports filed by Dr. Montalbano in June and December of 2008 against Drs. Zimmerman and Fox because of their continued disclosure of confidential information and disparaging remarks in violation of the MSPP.

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<sup>1</sup> See the attached exhibits to the Affidavit of Raymond D. Powers, filed simultaneously herewith, for copies of pertinent documents identified herein.

- **Re-commissioned Ad Hoc Committee** – committee comprised of Drs. Cushman, Austin, and Mallea reappointed to investigate Dr. Montalbano's Qstatim reports and determine whether the reports he filed were meritorious.
- **Precautionary Suspension under Chapter XI, Sec. 6** – a precautionary suspension put into place for the purpose of investigation only, when the person issuing the suspension believes it to be in the best interest of patient care or safety in the hospital, or continued effective operation of the hospital. Once the precautionary suspension is in place, the MEC is to take further action according to the Corrective Action Plan of the MSPP.
- **Fair Hearing** – practitioner is entitled to a formal hearing whenever a recommendation adverse to him has been made by the MEC or Board.
- **Fair Hearing Panel** – panel appointed by MEC to take evidence and hear testimony at practitioner's formal hearing and to recommend a course of action to those acting for the hospital.

**B. TIMELINE - Generally.**

- **March 31, 2008** – issue with Patient X prompts phone call to Dr. Montalbano from Jeanne Parker.
- **April 1, 2008** – Sherry Parks reports false allegations of disruptive conduct related to the telephone conversation between Dr. Montalbano and Jeanne Parker.
- **April of 2008** – upon review by the triage committee and PPPC, the Parks Qstatim Report is forwarded to the MEC for further investigation.
- **April 28, 2008** – the MEC appoints an ad hoc committee to investigate the Parks Qstatim Report.
- **April – June of 2008** – Dr. Fox discloses confidential information to Dr. Zimmerman who in turn discloses the confidential information to others.
- **June 24, 2008** – Dr. Montalbano reports Dr. Zimmerman's breaches of confidentiality to SARMC.
- **August 6, 2008** – Dr. Montalbano writes SARMC outlining his concern that his request for an investigation of breaches of confidentiality has been ignored and puts SARMC on notice that Dr. Fox disclosed the confidential information to Dr. Zimmerman.
- **August of 2008** – the Ad Hoc Committee recommends that Dr. Montalbano be suspended for 90 days despite knowing that the Parks Qstatim is false.
- **August 25, 2008** – the MEC adopts the Ad Hoc Committee's recommendation that Dr. Montalbano be suspended for 90 days. The MEC notifies Dr. Montalbano of the suspension and informs him that he is entitled to a fair hearing on the matter. The MEC also notified Dr. Montalbano that the suspension would be withheld pending the exercise of his appeal rights.
- **August – September of 2008** – Dr. Zimmerman again breaches the confidentiality policy of SARMC when he discloses to others the MEC's decision to suspend Dr. Montalbano's privileges.
- **August – September of 2008** – Dr. Zimmerman likely engages in negotiations with SARMC to become an employee at SARMC's Spine Medicine Institute.

- **September 16, 2008** – Dr. Montalbano notifies SARMC of his desire to have a fair hearing so that he can challenge the 90-day suspension.
- **September of 2008** – Dr. Zimmerman begins employment with SARMC's Spine Medicine Institute.
- **September – December of 2008** – Dr. Zimmerman continues to breach confidentiality with regard to the MEC's decision to suspend Dr. Montalbano's privileges for 90 days.
- **December 2, 2008** – Dr. Montalbano writes SARMC with regard to yet another instance where Dr. Zimmerman breached confidentiality and requests that it be investigated.
- **December 2, 2008** – Dr. Montalbano writes SARMC with regard to disparaging, defamatory comments made by Dr. Fox and requests an investigation.
- **December 18, 2008** – Dr. Clifford writes Dr. Montalbano to inform him that he has been issued a precautionary suspension related to his Qstatim reports and notified Dr. Montalbano that he would not be entitled to a fair hearing.
- **December 23, 2008** – Dr. Gough writes Dr. Montalbano to inform him that the MEC voted to investigate his Qstatim reports and discontinue the precautionary suspension while the matter is being investigated.
- **December of 2008** – the MEC appoints the same ad hoc committee to investigate the Montalbano Qstatim Reports that investigated the Parks Qstatim Report.
- **January 14, 2009** – the re-commissioned ad hoc committee recommends that the precautionary suspension issued by Dr. Clifford be reinstated, effective immediately and in force until Dr. Montalbano has exercised all appeal rights related to the Parks Qstatim Report.
- **January 21, 2009** – the MEC adopts the recommendation of the re-commissioned ad hoc committee and reinstates Dr. Clifford's precautionary suspension of Dr. Montalbano, without offering Dr. Montalbano a fair hearing, even though the suspension is to be in place for an indefinite period of time.
- **January 22-June 19, 2009** – Dr. Montalbano is under precautionary suspension, totaling 149 days, without an opportunity of a fair hearing to challenge the unwarranted suspension.
- **February 16-17, 2009** – a Fair Hearing Panel conducts the hearing on the Parks Qstatim Report and hears sworn testimony directly refuting the allegations of Sherry Parks.
- **March 23, 2009** – the Fair Hearing Panel recommends upholding the MEC's original 90-day suspension related to the Parks Qstatim Report despite direct evidence to the contrary.
- **April of 2009** – Dr. Montalbano appeals the recommendation of the Fair Hearing Panel.
- **June 10, 2009** – the Appellate Review Panel heard Dr. Montalbano's appeal on the Parks Qstatim Report and votes to uphold the MEC's original 90-day suspension, despite direct evidence refuting Parks' allegations.
- **June 19, 2009** – the Board of Trustees adopts the MEC's original 90-day suspension, despite direct evidence refuting Parks' allegations.
- **June 20, 2009** – the precautionary suspension is discontinued.

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- **June 20-September 16, 2009** – Dr. Montalbano is suspended for 90 days as a result of the Parks Qstatim Report.
- **January 22 – September 16, 2009** – Dr. Montalbano is suspended for a total of 239 days.
- **September 16, 2009** – the 90-day suspension is lifted.

**C. SARMC’S BYLAWS AND THE MEDICAL STAFF POLICY AND PLANS.**

The Bylaws and MSPP of SARMC outline and govern the process and activities to be followed when making the decision to suspend a physician’s privileges to the medical staff.<sup>2</sup> Dr. Montalbano maintains that the investigation of the Parks Qstatim Report was conducted improperly and resulted in an erroneous recommendation. He also maintains that the investigation of his Qstatim reports was inadequate, improper, and resulted in a lengthy, unwarranted precautionary suspension that was imposed without a fair hearing. SARMC contends otherwise. To fully appreciate the divergence of opinions and to understand the dynamics between the course of action taken and the course of action that should have been taken, an overview of the SARMC Bylaws and MSPP is necessary.

**1. Bylaws.**

Article I, Section 7.A.4 and 12 of the Bylaws sets forth that each member of the medical staff must abide by the Bylaws and MSPP, and maintain confidentiality. Section 8.G.7 of Article I of the Bylaws also sets forth that any practitioner has a right to a hearing/appeal pursuant to the Medical Staff’s Fair Hearing Plan in the event that an action or recommendation involves suspension of clinical privileges if such suspension is for longer than 14 days, except for those matters for which automatic suspension is required as set forth in the MSPP.<sup>3</sup>

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<sup>2</sup> Article I of the Bylaws and Chapters X, XI, and XII are attached as exhibits to the Affidavit of Raymond D. Powers.

<sup>3</sup> There was no automatic suspension or voluntary relinquishment of privileges in this matter.

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## **2. Conduct Policy.**

According to Chapter X, Conduct Policy, Section 1 of the MSPP, the intent of the conduct policy is to provide a procedure for the resolution of complaints of disruptive conduct reported or made by hospital employees, other practitioners, patients, or other individuals about a practitioners. The policy is to provide a collegial procedure to be used to address the conduct of practitioners, while acknowledging there may be certain circumstances that constitute grounds for corrective action. Disruptive conduct is defined under Section 2.B. as follows:

**Disruptive Conduct** • For purposes of this policy, disruptive conduct includes, but is not limited to, any of the following:

1. Using threatening or abusive language directed at an individual or regarding another individual, including patients, nursing staff, other Hospital personnel or Practitioners (e.g., belittling, berating and/or threatening an individual).
2. Making degrading, demeaning or insulting comments regarding patients, nursing staff, other Hospital personnel or the Hospital.
3. Using profanity, racial slurs or similarly offensive language.
4. Verbal, non-verbal or physical interaction with another individual that is reasonably perceived as threatening, intimidating or disruptive to the orderly operations of the Hospital.
5. Addressing concerns about clinical judgment of dissatisfaction with the performance of another individual in the medical record or by other inappropriate means (instead of through direct and professional contact with the individual or through Medical Staff or Hospital policies).

Section 3.C., Scope of the Policy, of the MSPP explains that

if there is a single severe incident of conduct, or a repetitive pattern of conduct that is egregious, this collegial procedure may be bypassed, and the Corrective Action Plan may be invoked. (If the Corrective Action Plan is invoked and the Practitioner's conduct results in an adverse action as defined in the Bylaws, then the Practitioner would be entitled to such rights as outline in the Fair Hearing Plan.)

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Under Section 4 of Chapter X, Conduct Policy, the procedures for documenting and triaging a report or complaint are given. Complaints alleging disruptive conduct concerning a practitioner should be reported and documented in the hospital's event reporting system. This "event reporting system" is otherwise known as a "Qstatim" or an incident report. A complaint or a report will be reviewed, evaluated, and triaged by the Event Report Triage Committee as outlined in Chapter X, Sec. 4.B. of the MSPP. Allegations are generally triaged by the Event Report Triage Committee as follows:

1. All anonymous reports/complaints are retained for tracking and trending. Anonymous reports/complaints will be assessed by the Event Report Triage Committee and may be referred for such investigation as is possible to undertake under the circumstances.
2. Reports/complaints that are evaluated as predominantly a result of system issues and involve a Practitioner who rarely has complaints filed against him or her may be referred to the manager of the area where the complaint occurred for further investigation.
3. Reports/complaints that are evaluated as predominantly system issues and involve a Practitioner who has frequent or repetitive complaints may be referred to the manager of the unit involved and to OMA to distribute to the Chair of the PPPC.
4. Any reports/complaints of egregious behavior, no matter the frequency of the complaints against the Practitioner, are referred to OMA for distribution to the Chair of the PPPC, the President and President-elect of the Medical Staff, the VP of Physician and Clinical Services, the CEO, or their respective designees. Complaints of unlawful harassment involving hospital employees will also be referred to the Manager of Employee Relations.

The Event Report Triage Committee is not directed to investigate the report/complaint. It reviews and evaluates the report/complaint as presented to it. It is unclear under which of the four triage scenarios the Event Report Triage Committee reviewed or evaluated the report filed

by Sherry Parks. However, since it was sent for review to the PPPC and then to an Ad Hoc Committee, the triage committee likely evaluated the report under either category 3 or 4.

Section 5 of Chapter X, MSPP, outlines the procedures for investigating a report/complaint and mandates that after the initial evaluation by the triage committee the PPPC will evaluate the report/complaint. Section 5 explains that during its evaluation, the PPPC will consider the facts and circumstances alleged, including severity of the conduct, the frequency of the complained of conduct, the information available that verifies the conduct, prior complaints, practitioner's attitude and willingness to professionally address the concerns raised. If the PPPC believes the allegations warrant, it can refer the matter to the MEC for initiation of an investigation under the Corrective Action Plan. If referred for corrective action, then the procedures for the Corrective Action Plan are to be followed from then on.

In the instance matter, there is no way the PPPC could have verified Parks' allegations of misconduct because the only person who had direct contact with Dr. Montalbano directly refuted Parks' allegations. On this basis alone, the report/complaint should have been dismissed and the process discontinued, without further investigation or involvement of the MEC.

### **3. Corrective Action.**

According to Chapter XI, Corrective Action Plan, Section 1 of the MSPP, a written request for an investigation under the Corrective Action chapter must be sent to the MEC whenever there is cause to question a practitioner's behavior or conduct, regardless of who calls a particular physician's behavior into question. The written request to the MEC must make specific reference to the activity or conduct giving rise to the request. The written request for the corrective action plan can be made by the president of the medical staff, the chair of a department, the chair of the credentials committee, a majority of the credentials committee or MEC, the chair of any other committee, a majority of a committee, the chair of the board, or the

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chief executive officer, as set forth in Chapter XI, Section 1. The Chief Executive Officer of the SARMC is to be notified in writing of all requests for investigation under the Corrective Action Plan. Ch. XI, Sec. 1.B., MSPP. The MEC has the discretion to appoint a three-person ad hoc committee to conduct the investigation. Ch. XI, Sec. 1.C.2.d., MSPP. Here, with regard to both the Parks Qstatim Report and the Montalbano Qstatim Reports, the reports were eventually referred to the MEC for corrective action and an ad hoc committee appointed to conduct an investigation of the report(s).

Once the investigation is complete, the MEC determines whether corrective action is warranted. Ch. XI, Sec. 2., MSPP. If corrective action is not appropriate, the MEC will issue a written report to that effect. Ch. XI, Sec. 2.A., MSPP. If corrective action is warranted as determined by the MEC, it may, among other options, recommend suspension of clinical privileges for a term. Ch. XI, Sec. 2.B.6., MSPP. Section 3 of Chapter XI provides that any recommendation for suspension of clinical privileges is considered an adverse recommendation. Such recommendation will be forwarded to the Chief Executive Officer who will notify the affected physician. The Chief Executive Officer is to then hold the recommendation until after the individual has exercised his right to a fair hearing. Ch. XI, Sec. 3., MSPP. The import of this requirement is to give the affected physician the opportunity to challenge the recommendation that adversely affected his privileges **before** the recommendation goes into effect, as set forth in Article I of the Bylaws, so that the affected physician will not be unnecessarily damaged and his reputation tarnished by having his privileges affected.

As to the Parks Qstatim Report, the suspension should not have been issued in the first instance because it could not be corroborated and was refuted by direct evidence. The false report filed by Sherry Parks should have been dismissed and the process stopped immediately.

With regard to the reports/complaints made by Dr. Montalbano, SARMC wrongfully placed Dr. Montalbano under suspension for an indeterminate amount of time, under the guise of it being a precautionary suspension, without affording him a fair hearing.

Under Chapter XI, Section 6, Suspension for Reasons of Patient Safety, MSPP, if patient care or safety or effective hospital operation are an issue, the president of the MEC, department chairs, the chair of the credentials committee, the chair of the physician professional practice committee, the Chief Executive Officer, or the Chair of the Board of Trustees has the authority to suspend any and all clinical privileges of a physician. The title of this particular section infers that this section is invoked under the extreme situation when patient safety is an immediate, emergent issue. However, “[s]uch suspension will be for the purpose of investigation only and will not imply any final finding of responsibility for the situation that caused the suspension.” Section 6.A. of Chapter XI, MSPP, goes on to state that when an individual has exercised his/her authority and placed a practitioner under precautionary suspension,

the Medical Executive Committee will take such further action as is required in the manner specified under this Corrective Action Plan, unless an investigation is already pending on the same subject matter.

Under Section 1.C.4, Chapter XI, Investigation Procedures, MSPP, the investigation referred to above will be completed

within sixty (60) days of the date the suspension is imposed if a suspension under Section 6 of the Corrective Action Plan is in effect. The sixty (60) day time period may be extended by the Board for good cause.

The interplay between sections 2, 4 and 6 is that section 6 allows for the temporary suspension of a practitioner’s privileges due to the belief that patient care/safety is an immediate issue. The suspension is a precautionary measure while the underlying matter is being investigated pursuant to the Corrective Action Plan. According to section 4, the investigation of

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the underlying matter is to be completed within 60 days, which means that the practitioner is to be without his/her privileges for no longer than 60 days, unless the Board extends the investigation. Upon completion of the investigation, the MEC takes further action as set forth in section 2 and determines whether corrective action is necessary or not. If the MEC determines that corrective action is warranted, it then may take one or more actions, including recommending suspension of clinical privileges for a term. This, in effect, would transform a precautionary suspension in to a suspension for a definite term, which would then entitle the practitioner to a fair hearing. The only occasions where a practitioner is not entitled to a fair hearing are when an individual's privileges are automatically terminated or have been voluntarily relinquished; neither is at issue here. Ch. XI, Sec. 9, MSPP.

In Dr. Montalbano's case, SARMC did not follow the MSPP and suspended Dr. Montalbano's privileges for 149 days after the investigation was completed, without affording him a fair hearing to which he was entitled.

**4. Fair Hearing Plan.**

As set forth in Article I of the Bylaws and reiterated below, in the event an action or recommendation results in the suspension of a practitioner's privileges to the medical staff the affected practitioner is entitled to a fair hearing. According to Chapter XII, Fair Hearing Plan, Section 1.A.5 and 7, of the MSPP, suspension of clinical privileges to the medical staff is a ground for the right to a fair hearing. Suspension of clinical privileges is deemed an adverse recommendation or an adverse action as such terms are used in Chapter XII and Chapter XI of the MSPP. Ch. XII, Sec. 1.B., MSPP.

The MEC has the initial burden of proof to come forward with evidence in support of its recommendation. Thereafter the burden will shift to the physician to come forward with evidence in support of his appeal. Ch. XII, Sec. 17, MSPP. In regard to the Parks Qstatim

Report, the MEC failed to support its recommendation with any direct evidence that the disruptive conduct complained of by Sherry Parks actually occurred. Dr. Montalbano, on the other hand, presented sworn testimony directly refuting Parks' allegations. Yet, the hearing panel ignored Dr. Montalbano's evidence and upheld the original decision of the MEC.

**5. Appellate Review.**

Upon a final recommendation adverse to him, the physician may request appellate review. Ch. XII, Sec. 20, MSPP. After the conclusion of the proceedings before an appellate review panel, the Board will render a final decision in writing. Ch. XII, Sec. 20.E., MSPP. Dr. Montalbano requested an appellate review. The appellate review panel recommended in favor of the MEC. The Board of Trustees adopted the original decision of the MEC, at which time the 90-day suspension went into effect.

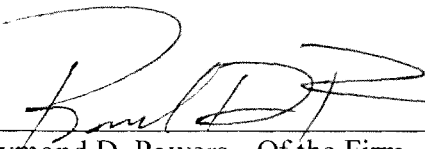
Dr. Montalbano, therefore, exhausted the administrative appeal process in the case at bar.

**CONCLUSION**

Dr. Montalbano has provided background information and argument to support his motion to compel production of information related to SARMC's wrongful suspension of his privileges in the memorandum and affidavit filed simultaneously herewith.

DATED this 20<sup>th</sup> day of January, 2010.

POWERS TOLMAN, PLLC

By   
Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of January, 2010, I caused to be served a true copy of the foregoing **APPENDIX IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF INFORMATION RELATED TO SARMC'S WRONGFUL SUSPENSION OF DR. MONTALBANO'S PRIVILEGES**, by the method indicated below, and addressed to each of the following:

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Givens Pursley LLP  
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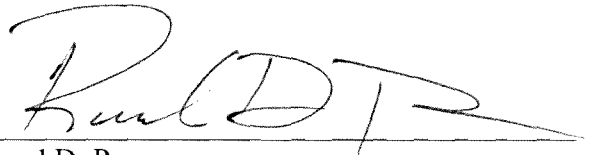
*Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks and  
Donald Fox, M.D.*

<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Telecopy

Andrew C. Brassey  
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Brassey, Wetherell & Crawford, LLP  
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*Attorneys for Defendant Christian G.  
Zimmerman, M.D.*

<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Telecopy



Raymond D. Powers  
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A.M. \_\_\_\_\_ P.M.

JAN 20 2011

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION TO  
COMPEL PRODUCTION OF  
INFORMATION RELATED TO  
SARMC'S WRONGFUL  
SUSPENSION OF DR.  
MONTALBANO'S PRIVILEGES**

**COMES NOW**, Plaintiff PAUL J. MONTALBANO, M.D. (Dr. Montalbano), by and through his attorneys of record, POWERS TOLMAN, PLLC, and submits this memorandum in support of his motion to compel production of information relevant to St. Alphonsus Regional

Medical Center's (SARMC) wrongful suspension of Dr. Montalbano's privileges at SARMC and overruling the peer review privilege and immunity objections asserted by SARMC.

## **I. INTRODUCTION**

Dr. Montalbano brought this action against defendants as the result of SARMC's wrongful suspension of his privileges at SARMC, which went into effect January 22, 2009. The bases for Dr. Montalbano's action relate to separate events that culminated in his neurosurgical privileges at SARMC being suspended for a total of 239 days, even though Dr. Montalbano's clinical competence or patient care were never at issue.

Throughout this memorandum, the phrase "Qstatim report" will be used. To briefly explain, Qstatim is an in-house reporting system whereby individuals can make reports/complaints about practitioners to alert SARMC of conduct and system issues that need correction. The Qstatim system is widely used and often relied upon to report alleged violations of the Conduct Policy outlined in Chapter X, Section 1 of the MSPP. A Qstatim report is made by a hospital employee, patient, practitioner, or other individual about a practitioner alleging disruptive conduct or unlawful harassment in violation of the hospital policy. Generally, a triage committee evaluates a Qstatim report for an initial determination. If the triage committee believes the report is sufficient on its face, it will send the report on for further review, evaluation, and possible investigation by other committees. The Physician Professional Practice Committee (PPPC), a committee that deals solely with Qstatim reports related to conduct, is to preliminarily investigate any Qstatim report involving the conduct policy and determine whether a full investigation by the Medical Executive Committee (MEC) is warranted. A full description of the process is addressed in the appendix to this memorandum filed contemporaneously herewith.

On April 1, 2008, defendant Sherry Parks filed a false Qstatim report claiming Dr. Montalbano violated the hospital's disruptive conduct policy (Parks Qstatim Report). Upon cursory evaluation by the triage committee and PPPC, the report was referred to the MEC for further investigation. The MEC appointed an ad hoc committee to investigate the allegations reported by Sherry Parks to determine whether the report had merit. The Ad Hoc Committee interviewed several individuals who had some knowledge of the underlying facts, including the only individual to have spoken directly with Dr. Montalbano. This individual, Jeanne Parker, refuted Parks' allegations, which rendered Sherry Parks' allegations false and directly called into question Sherry Parks' credibility. Nevertheless, in August of 2008, upon the recommendation of the Ad Hoc Committee, the Medical Executive Committee (MEC) recommended that Dr. Montalbano be suspended for 90 days as a result of the false Qstatim report. The suspension would not take place until after Dr. Montalbano exhausted his administrative appeal rights. Dr. Montalbano exercised his right to a fair hearing, which could not be scheduled until February of 2009.

Throughout the administrative process, Drs. Fox and Zimmerman breached SARMC's confidentiality policy by disclosing confidential information regarding Dr. Montalbano and the Parks Qstatim Report filed asserting disruptive conduct. In June of 2008, Dr. Montalbano alerted SARMC about the misconduct of Dr. Zimmerman related to his disclosure of confidential information, which Dr. Fox had given to him. Dr. Montalbano requested that Dr. Zimmerman's conduct be investigated. In December of 2008, Dr. Montalbano again notified SARMC and identified Drs. Fox and Zimmerman as violating SARMC's Bylaws and Medical Staff Policy and Plans (MSPP). Dr. Montalbano's letters served as Qstatim reports (Montalbano Qstatim Reports). The MEC appointed the same ad hoc committee to investigate Dr. Montalbano's complaints, even though it could have appointed an independent committee instead.



In January of 2009, without thoroughly investigating Dr. Montalbano's Qstatim reports, the same Ad Hoc Committee recommended that Dr. Montalbano be placed under a precautionary suspension. Based upon the Ad Hoc Committee's recommendation, the MEC issued Dr. Montalbano an immediate precautionary suspension, claiming the Qstatim reports he filed were "retaliatory." At the time it was imposed, the precautionary suspension was indefinite – it was to be in place while Dr. Montalbano was exercising his appeal rights pertaining to the Parks Qstatim Report. The precautionary suspension resulting from the Montalbano Qstatim Reports remained in effect for 149 days and was imposed without SARMC offering Dr. Montalbano the right to a fair hearing.

In February of 2009, the Fair Hearing Panel, which was appointed to make a recommendation on the Parks Qstatim Report, upheld the 90-day suspension recommended by the Ad Hoc Committee in August of 2008.

On June 19, 2009, the Board of Trustees adopted the 90-day suspension recommended by the MEC with regard to the Parks Qstatim Report, at which time the precautionary suspension expired. The details of the events are set forth more fully in section II of this memorandum.

In his Amended Complaint and Demand for Jury Trial, Dr. Montalbano alleges that defendants SARMC and Dr. Fox acted in bad faith during the investigative process and the resulting decisions that culminated in the suspension of Dr. Montalbano's privileges. SARMC and Dr. Fox's bad faith include the decision to perpetuate the false Parks Qstatim Report, the decision not to properly investigate the Montalbano Qstatim Reports, and the decision not to afford Dr. Montalbano a fair hearing before suspending his privileges for 149 days. Defendants' goal was to impair Dr. Montalbano's ability to practice spine surgery at SARMC. The processes and the decisions made throughout the series of events ultimately led to the suspension of Dr. Montalbano's neurosurgical privileges for 239 days. Not one day of the imposed suspension was

warranted based on the evidence. SARMC's Bylaws and MSPP govern the activities and set forth the procedures that SARMC should have followed when SARMC and Dr. Fox set out to suspend Dr. Montalbano's privileges.

Dr. Montalbano propounded discovery to SARMC seeking information related to the processes, activities, and decisions that ultimately led to the suspension his privileges. Dr. Montalbano plans to depose those individuals who have relevant knowledge about the wrongful suspension of his privileges.

SARMC has asserted a broad objection to Dr. Montalbano's discovery requests<sup>1</sup> that relate in any way to information surrounding the process, activities, or decisions to suspend Dr. Montalbano's privileges. SARMC asserts that the discovery requested is either protected by immunity under Idaho Code Section 39-1392c or is confidential and privileged under Idaho Code Section 39-1392b. Out of 119 requests for admission propounded by Dr. Montalbano, SARMC has objected to 98 of the requests stating "SARMC objects to Request No. \_\_\_ to the extent it seeks information protected by the peer review privilege;" SARMC did attempt to respond to some of the requests for admission.<sup>2</sup> With regard to the 24 interrogatories propounded by Dr. Montalbano, SARMC objected to one of them on the grounds that the "Plaintiff's claims fail as a matter of law for reasons including the immunity provided under Idaho Code § 39-1392c, the Healthcare Quality Improvement Act, and the release language

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<sup>1</sup> Dr. Montalbano anticipates that SARMC will also object to his deposing many of the necessary witnesses who have relevant information, the information shared, and the basis for the numerous decisions made that supported the suspension of his privileges. Dr. Montalbano seeks a ruling from the Court which will provide guidance on the issues that can be inquired about in these depositions.

<sup>2</sup> Defendant Saint Alphonsus Regional Medical Center's Response to Plaintiff's First Set of Requests for Admission to Saint Alphonsus Regional Medical Center, attached as an exhibit to the Affidavit of Raymond D. Powers filed in support hereof. This document, as well as the additional documents that follow, are all exhibits to Mr. Powers' affidavit.

contained in the Medical Staff Bylaws, Policy and Plans . . . .”<sup>3</sup> SARMC objected to 17 of the interrogatories on the ground that the information is protected by the peer review privilege; it made no attempt to respond to 12 of the interrogatories to which it objected. Of the 33 requests for production, SARMC objected claiming immunity on one of them, claimed peer review privilege on 29 of them, and did not produce any documents.

Idaho Code Sections 39-1392b and 39-1392c do not apply to the issues framed by this case. The type of information requested is not the type of information that arises from patient care activities within a hospital. Dr. Montalbano’s allegations are not related to medical malpractice actions, do not involve any issues of patient care, and have not been brought against particular individuals who served on any review committees. The type of information requested is no different than the type of information requested in a wrongful termination case. Just as an employer’s personnel file, thought processes, and decisions related to an employee’s termination are discoverable by an aggrieved employee, so should SARMC’s “personnel” file on Dr. Montalbano be discoverable, as well as the thought processes and decisions related to Dr. Montalbano’s temporary “termination” from the medical staff. Therefore, “peer review privilege” and immunity are inapplicable here.

Dr. Montalbano moves this Court for an order that 1) the peer review privilege in Idaho Code Section 39-1392b is inapplicable, 2) the immunity in Idaho Code Section 39-1392c is inapplicable, 3) prohibits SARMC, absent exceptional circumstances, from raising peer review privilege and immunity objections in further discovery, and 4) compels SARMC to produce the information Dr. Montalbano has requested in his interrogatory nos. 1, 3-5, 10, 11 13-24; requests for production nos. 1, 2, 4, 5, 7-33, and request for admissions nos. 17-33, 37-39, 45-100, 102-

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<sup>3</sup> Defendant Saint Alphonsus Regional Medical Center’s Response to Plaintiff’s First Set of Interrogatories and Requests for Production of Documents.

05, 107-09, 111-15, 117-18 to which SARMC has objected, but has not fully responded asserting peer review privilege and immunity objections.

## II. BACKGROUND INFORMATION

SARMC, through its Board of Trustees, administrators, representatives, and agents, including Dr. Fox, wrongfully suspended Dr. Montalbano's neurosurgical privileges at SARMC. SARMC did not follow its own Bylaws and its MSPP throughout the entire process that led to the decision to suspend Dr. Montalbano's privileges. The limited information available to Dr. Montalbano demonstrates that neither the ad hoc committee investigating the Parks Qstatim Report, nor the MEC, nor the Fair Hearing Panel dismissed the Qstatim report when it became obvious through witness testimony that Dr. Montalbano's conduct was not disruptive whatsoever and that Sherry Parks had filed a false and misleading report. The limited information also demonstrates that SARMC did not properly investigate the issues raised in the Montalbano Qstatim Reports and, instead, placed Dr. Montalbano under precautionary suspension for 149 days without affording him a fair hearing to challenge such a lengthy suspension.

An appendix in support of Dr. Montalbano's motion has been filed separately and contains definitions, a timeline, and an overview of the pertinent Bylaws and MSPP sections to give the Court context for the following background information, should such context be necessary.

The following background information is provided to illustrate the importance of overruling SARMC's peer review privilege and immunity objections. Dr. Montalbano cannot know all of the facts to support his case at this time because SARMC has objected to his discovery requests; therefore, not all of the alleged facts and background information provided in this section can be linked to specific supporting documentary or testimonial evidence at this

time. Dr. Montalbano believes he can prove the allegations he has asserted but he needs the right to conduct meaningful discovery.

**A. SHERRY PARKS' QSTATIM REPORT.**

On April 1, 2008, Defendant Sherry Parks filed a Qstatim report implying that Dr. Montalbano used argumentative and threatening language in a conversation with the clinical coordinator involving Patient X.<sup>4</sup> The information Parks provided in the report was false; Parks knew the information was false and not accurate when she prepared the report. Parks prepared the erroneous report after being present in the same area while another staff member, Jeanne Parker actually spoke to Dr. Montalbano on the telephone regarding a situation involving Patient X. The information contained in the Qstatim report cannot be substantiated or reconciled with Ms. Parker's testimony of what was actually said by Dr. Montalbano in their conversation. Parks admitted at the Fair Hearing that she had no direct interaction with Dr. Montalbano. Not to go unnoticed is the fact that Jeanne Parker did not prepare a Qstatim report as a result of her conversation with Dr. Montalbano on March 31, 2008.

The SARMC Bylaws provide that all Qstatim reports will be forwarded to the Event Report Triage Committee for review and a determination on whether each individual report has merit and should be addressed further by other committees.<sup>5</sup> Without conducting any kind of investigation into Parks' allegations, the triage committee passed the report up to the Physician Professional Practice Committee (PPPC) for review. Both committees accepted Parks' version of the facts as reported in her Qstatim report, without determining the truth and accuracy of the allegations. Based upon its failure to properly evaluate the Qstatim report, the PPPC

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<sup>4</sup> Qstatim report made by Sherry Parks dated April 1, 2008.

<sup>5</sup> Chapter X, Sec. 4.B., MSPP.

recommended to the MEC that the MEC appoint an ad hoc committee to further investigate the Parks Qstatim Report, pursuant to the Corrective Action Plan of the Bylaws.

1. **Appointment and Recommendation of the Ad Hoc Committee.**

On April 28, 2008, the MEC appointed a three-person panel of physicians to serve as the Ad Hoc Committee, namely Dr. Austin Cushman, Dr. Mike Mallea, and Dr. Mike Estess. The Ad Hoc Committee was directed to investigate the Parks Qstatim Report and make a recommendation to the MEC. The Ad Hoc Committee conducted interviews with hospital staff who were involved, including Jeanne Parker and Sherry Parks. Jeanne Parker was the only person who communicated directly with Dr. Montalbano regarding the underlying incident. Parker did not complain, however, to the Ad Hoc Committee about Dr. Montalbano's behavior. In telling her side of the story to the committee, Parker spoke of Dr. Montalbano's willingness to be helpful and that Dr. Montalbano was truly a gentleman in his conversation with her. Parker did not present any evidence to the committee that Dr. Montalbano's conduct was within the definition of disruptive conduct under Chapter X of the MSPP, making it clear to the committee that Parks had fabricated the information in her Qstatim report.<sup>6</sup>

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<sup>6</sup> Disruptive conduct is defined in the Bylaws as follows:

**Disruptive Conduct** • For purposes of this policy, disruptive conduct includes, but is not limited to, any of the following:

1. Using threatening or abusive language directed at an individual or regarding another individual, including patients, nursing staff, other Hospital personnel or Practitioners (e.g., belittling, berating and/or threatening an individual).
2. Making degrading, demeaning or insulting comments regarding patients, nursing staff, other Hospital personnel or the Hospital.
3. Using profanity, racial slurs or similarly offensive language.
4. Verbal, non-verbal or physical interaction with another individual that is reasonably perceived as threatening, intimidating or disruptive to the orderly operations of the Hospital.
5. Addressing concerns about clinical judgment of dissatisfaction with the performance of another individual in the medical record or by other

Under Chapter X, Sec. 8 of the MSPP, any hospital employee “who makes up facts to falsify allegations of violations of this policy against any Practitioner will be subject to appropriate disciplinary action . . . .” The Ad Hoc Committee knew that Sherry Parks had made up facts to falsify the allegations, but did not dismiss the report or take steps to have her disciplined.

Remarkably, despite knowing that Parks submitted a false report, in August of 2008, upon completing its investigation, the Ad Hoc Committee concluded that Dr. Montalbano violated the disruptive conduct policy. The committee recommended a 90-day suspension of privileges, which was to be withheld pending Dr. Montalbano’s exercise of his fair hearing rights. The Ad Hoc Committee had an obligation to dismiss the Parks Qstatim Report and recommend Sherry for disciplinary action based on her false allegations, but did neither.

**2. The MEC Relied Upon False Information When It Adopted The Ad Hoc Committee’s Recommendation.**

Dr. Fox and the Ad Hoc Committee intentionally withheld relevant information from the MEC when they presented the recommendation of the Ad Hoc Committee. Dr. Fox and the Ad Hoc Committee knew that the Parks Qstatim Report contained false statements, false accusations, and misrepresented the facts. Despite this knowledge, Dr. Fox and members of the Ad Hoc Committee did not inform the MEC that Jeanne Parker’s testimony rendered Parks’ Qstatim allegations completely false. Instead, Dr. Fox and the Ad Hoc Committee persuaded the MEC that there was strong evidence of disruptive conduct that needed to be addressed.

On August 25, 2008, the MEC voted to accept the Ad Hoc Committee’s recommendation of a 90-day suspension, which would not go into effect until after Dr. Montalbano had exercised

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inappropriate means (instead of through direct and professional contact with the individual or through Medical Staff or Hospital policies).

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his administrative rights, including a fair hearing and an appeal.<sup>7</sup>

Dr. Montalbano notified SARMC on September 16, 2008, that he desired a fair hearing on the recommended suspension. Soon after being notified, the MEC appointed a Fair Hearing Panel, consisting of Dr. Joseph H. Williams, Dr. Jon Wagnild, and Karl Kurtz, to take evidence and hear testimony concerning this matter. The hearing was not scheduled to take place until February 16 and 17, 2009.

**B. DR. MONTALBANO'S QSTATIM REPORTS.**

During the time the Ad Hoc Committee was conducting its investigation of the Parks Qstatim Report, Dr. Fox, as President of the Medical Staff, disclosed confidential information to Dr. Zimmerman<sup>8</sup> about the investigation and the deliberations taking place regarding the Ad Hoc Committee's investigation of the allegations contained in the Parks Qstatim Report. In doing so, Dr. Fox breached the hospital's confidentiality policy.<sup>9</sup> Like Dr. Fox, Dr. Zimmerman also breached SARMC's confidentiality policy when he chose to share the information he had learned from Dr. Fox with other individuals employed by and affiliated with the hospital. Because of the divisive nature of these breaches of confidentiality, Drs. Fox and Zimmerman were also in breach of the disruptive conduct policy.

By letter of June 24, 2008, Dr. Montalbano notified SARMC of his knowledge of this breach of confidentiality by Dr. Zimmerman and requested an investigation of Dr. Zimmerman's conduct.<sup>10</sup> Through a letter dated August 6, 2008, Dr. Montalbano questioned why there had been no investigation of Dr. Zimmerman or Dr. Fox in response to his complaints about

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<sup>7</sup> Letter from Janelle Reilly to Dr. Montalbano dated August 26, 2008.

<sup>8</sup> Dr. Zimmerman was not part of the investigative process.

<sup>9</sup> Article I, Sec. 7 of the Bylaws and Chapter X, Sec. 3.D. of the MSPP.

<sup>10</sup> Letter from Dr. Montalbano to Drs. Estess, Mallea, and Cushman, Sandra Bruce, and Joan Weddington dated June 24, 2008.



misconduct and breaches of confidentiality.<sup>11</sup> Dr. Montalbano put the MEC and SARMC on notice through this letter that Dr. Fox was the person who divulged the confidential information to Dr. Zimmerman and pointed out the obvious bias related to Dr. Fox's further involvement in the process.<sup>12</sup> No substantive response was provided by SARMC, however.

After the MEC approved the Ad Hoc Committee recommendation on August 25, 2008, yet another breach of confidentiality occurred when Dr. Zimmerman was informed of the MEC's decision and disclosed the confidential decision to the public.

During the time frame that Drs. Fox and Zimmerman were breaching confidentiality, it is likely that negotiations between SARMC and Dr. Zimmerman were taking place as to Dr. Zimmerman becoming an employee of SARMC to head SARMC's Spine Medicine Institute. In approximately September of 2008, Dr. Zimmerman became an employee at the Spine Medicine Institute and would compete with Dr. Montalbano for spine patients.

It became increasingly clear to Dr. Montalbano that SARMC was ignoring his allegations of breach of confidentiality involving Drs. Fox and Zimmerman. Having no other choice, on December 2, 2008, Dr. Montalbano filed a formal Qstatim report alerting SARMC that Dr. Zimmerman had again violated SARMC's confidentiality policy and requested that Dr. Zimmerman's conduct be investigated.<sup>13</sup> On the same day, Dr. Montalbano also filed a formal Qstatim report requesting an investigation of disparaging, disruptive comments Dr. Fox made to others about Dr. Montalbano, which demonstrated Dr. Fox's obvious bias against Dr. Montalbano.<sup>14</sup>

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<sup>11</sup> Letter from Dr. Montalbano to Drs. Fox, Estess, Cushman, and Mallea, Sandra Bruce, and Joan Weddington dated August 6, 2008.

<sup>12</sup> *Id.*

<sup>13</sup> Letter from Dr. Montalbano to Dr. David Gough dated December 2, 2008, regarding Dr. Zimmerman.

<sup>14</sup> Letter from Dr. Montalbano to Dr. David Gough dated December 2, 2008, regarding Dr. Fox.

1. **Dr. Montalbano Is Retaliated Against After Reporting Misconduct By Drs. Fox and Zimmerman.**

Instead of thoroughly investigating all of Dr. Montalbano's Qstatim reports, the PPPC, through its chairman Dr. Clifford, on December 18, 2008, chose to issue an unfounded and unsupported precautionary suspension against Dr. Montalbano under Chapter XI, Sec. 6, of the MSPP.<sup>15</sup> According to Dr. Clifford, the purpose of the precautionary suspension was for investigating concerns that Dr. Montalbano's conduct in filing the two Qstatim reports was disruptive, retaliatory and jeopardized patient care.<sup>16</sup> The suspension was to go into effect on December 18, 2008. Dr. Montalbano was informed through Dr. Clifford's letter that he was not entitled to procedural rights afforded by the Fair Hearing Plan. The precautionary suspension was in direct violation of the No Retaliation Policy outlined in Chapter X, Sec. 9 of the MSPP, wherein it states that the "Medical Staff and Hospital will not tolerate any retaliation against, or any intimidation of, any person who has complained of conduct in violation of this policy . . . ."

Interestingly, the MEC notified Dr. Montalbano on December 23, 2008, that it had voted to discontinue its precautionary suspension while it investigated his Qstatim reports concerning Dr. Zimmerman and Dr. Fox.<sup>17</sup> The MEC appointed the same ad hoc committee, consisting of Drs. Mallea, Cushman, and Estess, to conduct the investigations, instead of appointing an independent committee.<sup>18</sup> It is unclear how the same ad hoc committee that had previously recommended suspending Dr. Montalbano could conduct an unbiased investigation of Dr. Montalbano's Qstatim reports alleging misconduct by Dr. Fox and Dr. Zimmerman.

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<sup>15</sup> Letter from Dr. Clifford to Dr. Montalbano dated December 18, 2008.

<sup>16</sup> Letter from Dr. Clifford to Dr. Montalbano dated December 18, 2008; it is noted in later documentation that Dr. Clifford, as Chairman of the PPPC, previously investigated the Qstatim report Dr. Montalbano had filed against Dr. Fox. Dr. Montalbano also reported misconduct with regard to Dr. Binnion that is not part of this action.

<sup>17</sup> Letter from Dr. David Gough to Dr. Montalbano dated December 23, 2008.

<sup>18</sup> RFA No. 88 and 90. In its report dated January 14, 2009, the Ad Hoc Committee points out that it was not conducting an investigation of Dr. Fox.

2. **The Re-Commissioned Ad Hoc Committee Recommends Against Dr. Montalbano.**

It was inappropriate for the MEC to re-appoint the very committee that had reviewed the Parks Qstatim Report and had already made a recommendation against Dr. Montalbano. Because Dr. Montalbano's Qstatim reports involved different claims and different practitioners, he deserved to have a different ad hoc committee investigate his particular claims. Appointing the same ad hoc committee set the stage for the investigation of the Montalbano Qstatim Reports to be blended with the completed investigation of the Parks Qstatim Report, which is contrary to the procedure provided for in the MSPP.

To begin the investigation, the re-commissioned Ad Hoc Committee was provided with the same summary profile information relative to Dr. Montalbano as it was provided when it investigated the Parks Qstatim Report. Clearly, the re-commissioned Ad Hoc Committee was not investigating Dr. Zimmerman because the focus was on Dr. Montalbano, as it had been in the investigation of the Parks Qstatim Report. Dr. Montalbano's concerns about Drs. Fox and Zimmerman were not addressed through the cursory and inadequate effort by the re-commissioned Ad Hoc Committee to "investigate" Dr. Montalbano's complaints. If the committee had conducted an appropriate investigation, Drs. Zimmerman and Fox would have been the focus of the investigation – not Dr. Montalbano.

The re-commissioned Ad Hoc Committee met on January 14, 2009, and in violation of the MSPP, recommended that the precautionary suspension of Dr. Montalbano, previously imposed by Dr. Clifford, be reinstated immediately.<sup>19</sup> The committee concluded that Dr. Montalbano's Qstatim complaints were filed in retaliation and violated the No Retaliation Policy

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<sup>19</sup> Re-Commissioned Ad Hoc Committee Report dated January 14, 2009.

in Chapter X, Sec. 9 of the MSPP. For Dr. Montalbano to have “retaliated” in violation of the No Retaliation Policy, however, would require him to have filed a Qstatim report implicating Sherry Parks, which he did not do. It is unreasonable to believe that Dr. Montalbano could be retaliating against Sherry Parks by filing complaints about the misconduct of Drs. Fox and Zimmerman. Dr. Montalbano was reporting Dr. Fox and Dr. Zimmerman’s misconduct related to breaches of confidentiality, bias, and disparaging statements – not because they were directly involved in the Parks Qstatim Report. The Ad Hoc Committee’s conclusion that Dr. Montalbano retaliated is unfounded and amounts to a pretext for suspending his privileges. The only retaliation at issue was SARMC’s retaliation against Dr. Montalbano for bringing to light Drs. Fox and Zimmerman’s misconduct and for challenging the veracity of the Parks’ Qstatim Report.

The re-commissioned Ad Hoc Committee also recommended that the precautionary suspension would remain in effect until Dr. Montalbano had exercised all of his procedural rights related to the Parks Qstatim Report. The precautionary suspension necessarily would be for an indeterminate amount of time, and according to Dr. Clifford’s December 18, 2008, letter the suspension would take place without a fair hearing.

Linking the precautionary suspension to the Parks Qstatim Report proceeding further blended Dr. Montalbano’s Qstatim reports with Parks’ Qstatim report, which is inconsistent with the policy that all Qstatim reports should be processed independently.

The actions by Dr. Clifford and the MEC in December of 2008 and the recommendation of the re-commissioned Ad Hoc Committee created several inconsistencies and conflicts. Dr. Clifford originally issued the precautionary suspension under Chapter XI, Sec. 6 of the MSPP. A precautionary suspension under Chapter XI, Sec. 6 should only be exercised

in the best interest of patient care or safety in the Hospital, or the continued effective operation of the Hospital. Such suspension will be for the purpose of investigation only

and will not imply any final finding of responsibility for the situation that caused the suspension.

The implication being that once the investigation is complete then a final finding of responsibility will be made, which was not the case in this instance.

It is apparent by the MEC's December actions to discontinue the precautionary suspension that patient care/safety and effective operation of the hospital were not a problem since the MEC withdrew the precautionary suspension during the investigation. Yet, the re-commissioned Ad Hoc Committee recommended a precautionary suspension after the investigation, claiming that Dr. Montalbano "has engaged in behaviors that are retaliatory and disruptive to the continued effective operation of the Hospital." This position is inconsistent with the purpose of a precautionary suspension and demonstrates a complete disregard for procedures and policies as set forth in the MSPP.

Additional conflict was created with the MSPP by the fact that no triage committee evaluated Dr. Montalbano's reports, no new ad hoc committee was appointed, and no "summary profile" on Dr. Fox or Dr. Zimmerman was prepared and given to the ad hoc committee. SARMC's conduct is inconsistent with the purpose of the investigatory process for Qstatim reports, is inconsistent with how it investigated Parks' Qstatim report, and, again, demonstrates SARMC's willingness to manipulate its own Bylaws and MSPP to serve its own purposes. SARMC's actions also confirm Dr. Montalbano's suspicions that SARMC was not willing to fairly evaluation his complaints.

These types of inconsistencies are examples of why it is important to allow Dr. Montalbano to conduct discovery to uncover the communications and decisions made by the defendants and their agents.

3. The MEC Adopts The Re-Commissioned Ad Hoc Committee's Recommendation.

The MEC adopted the re-commissioned Ad Hoc Committee's recommendation and reinstated the precautionary suspension against Dr. Montalbano, effective January 22, 2009. Dr. Fox, again, manipulated the facts in an effort to persuade the MEC to suspend Dr. Montalbano a second time. In his presentation to the MEC, Dr. Fox stated that he took Dr. Montalbano's allegations very personally.

Additionally, since the precautionary suspension was tied to the administrative appeals process, it was for an indefinite time period. A practitioner is entitled to a fair hearing if a suspension is to last for longer than 14 days according to Article I, Sec. 8.G.7 of the Bylaws; Dr. Montalbano was under a precautionary suspension for **149 days**. Through Dr. Clifford's December 18, 2008, letter, Dr. Montalbano was notified that he had no right to a fair hearing to challenge the 149 day precautionary suspension, which violates the Bylaws and MSPP.

SARMC used a double standard when it came to evaluating Parks' Qstatim report and Montalbano's Qstatim reports. When Parks prepared her Qstatim report asserting disruptive conduct, Dr. Montalbano was the focus of the investigation, her report was given credibility despite the fact there was direct evidence to the contrary, with Dr. Montalbano being afforded a fair hearing before his privileges were suspended. When Dr. Montalbano made reports of misconduct, he remained the focus of the investigation, his reports were considered to be meritless and retaliatory, and he was suspended for 149 days without the right to a fair hearing. This is an example of how the Qstatim process at SARMC was misused and manipulated in Dr. Montalbano's circumstance and is further support for allowing Dr. Montalbano to discover the basis for SARMC's curious and unfair actions.

**C. THE FAIR HEARING PANEL IGNORES THE SWORN TESTIMONY OF JEANNE PARKER.**

Because Dr. Montalbano exercised his right to a fair hearing with regard to the Parks Qstatim Report, SARMC appointed three physicians of its choosing to comprise the Fair Hearing Panel. On February 16 and 17, 2009, the Fair Hearing Panel took evidence and heard sworn testimony from SARMC and Dr. Montalbano.<sup>20</sup> Jeanne Parker was called to give sworn testimony based on her direct communications with Dr. Montalbano, which allegedly formed the basis for Sherry Parks' report. Her sworn testimony directly refuted Sherry Parks' testimony and the facts Parks alleged in her Qstatim report. Consistent with her previous statements, Ms. Parker testified that in her telephone conversation with Dr. Montalbano he was very polite, very professional, and very nice.<sup>21</sup> Neither raised their voice during the conversation; the conversation was very professional.<sup>22</sup> According to Jeanne Parker, Dr. Montalbano did not use threatening or abusive language, did not make degrading or demeaning comments, did not use profanity or offensive language, and was not threatening or intimidating.<sup>23</sup> At this juncture, SARMC and its agents had an obligation to dismiss the Parks Qstatim Report when it again became obvious that the report contained intentional false statements, false accusations, intentional misrepresentations of the facts, and was from an employee whose testimony was refuted and uncorroborated by other credible witnesses.

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<sup>20</sup> The Fair Hearing Panel was not asked to review the precautionary suspension issued in January of 2009.

<sup>21</sup> The following citations are to the Fair Hearing Transcript and are identified by the individual's last name, followed by the page and line reference(s). Parker 579:17-20.

<sup>22</sup> Parker 579-80:21-1.

<sup>23</sup> Parker 581.

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The Fair Hearing Panel ignored Parker's sworn testimony, however, and upheld the 90-day suspension recommendation of the MEC on the Parks Qstatim Report.<sup>24</sup> Dr. Montalbano must be allowed to discover how the panel could have shirked its responsibility.

**D. THE APPELLATE REVIEW PANEL AND BOARD OF TRUSTEES ALSO IGNORED SWORN TESTIMONY OF JEANNE PARKER.**

Dr. Montalbano appealed the recommendation of the Fair Hearing Panel as provided for under Chapter XI, Section 20 of the MSPP. An appellate review panel was appointed by SARMC and heard the matter on June 10, 2009. At the hearing, Dr. Montalbano again asked SARMC and its agents to recognize the false accusations in the Parks Qstatim Report and dismiss the matter. SARMC and its agents refused to do so. The Appellate Review Panel noted that Dr. Montalbano's clinical skills are highly regarded. The panel also conceded that Sherry Parks' testimony was contradicted by the testimony of others, making the accuracy of her statements questionable. Nevertheless, the Appellate Review Panel ignored such testimony and upheld the MEC's decision.

The Board of Trustees also chose to protect its own and voted in favor of upholding the MEC's decision to suspend Dr. Montalbano's privileges. As expected, the MEC rubber stamped the flawed process. On June 19, 2009, the precautionary suspension that had been in effect since January 22, 2009, was discontinued and the 90-day original suspension recommended by the MEC in August of 2008 went into effect.

In sum, Dr. Montalbano was without his neurosurgical privileges at SARMC for 239 consecutive days.

Dr. Montalbano is left with only the civil justice system to address the wrongs against him. He must have the opportunity to explore the decisions and the bases for those decisions to

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<sup>24</sup> Recommendation of the Fair Hearing Panel dated March 23, 2009.



expose defendants' bad faith and wrongful conduct. If SARMC's objections are not overruled, SARMC will never be required to justify its decisions, which equates to a finding of absolute immunity. If Dr. Montalbano is not allowed to discover the materials and information it has requested, the Court will, in effect, be giving SARMC license to do whatever it wants, to whomever it wants, and in the manner it wants. Giving such sweeping power to SARMC is unsupportable.

There are strong arguments supporting production of the information to which SARMC has objected. The Idaho Supreme Court decision in *Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631 (2009) supports Dr. Montalbano's position that there is no peer review protection for a hospital's credentialing decisions. Other jurisdictions have recognized the limited nature of the peer review statutes and have carved out exceptions for this type of situation. Failure to recognize the discovery of information in the present situation would create absolute immunity, allowing hospitals to act without any accountability whatsoever. Further support of Dr. Montalbano's position is that Congress declined to create a medical peer review privilege in creating the Health Care Quality Improvement Act. Finally, public policy demands that Dr. Montalbano be allowed to discover information related to proceedings that are about him, that adversely affect his privileges, and have nothing to do with the care he provides his patients.

### **III. ARGUMENT**

SARMC has objected to Dr. Montalbano's discovery requests related to materials and information that concern the process carried out against Dr. Montalbano. The bases for defendants' objections are in Idaho's peer review statutes, specifically Idaho Code Sections 39-1392b and 39-1392c. Reliance on these statutes is misplaced under the circumstances of this case. In fact, Idaho law supports this Court finding that the peer review privilege and immunity

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statutes are inapplicable, allowing for the discovery of information related to the activities and decisions concerning Dr. Montalbano and the wrongful suspension of his privileges.

A. **LEGISLATIVE HISTORY OF THE PEER REVIEW STATUTES SHOWS THAT THE STATUTES ARE TO PROTECT HEALTH CARE PROVIDERS FROM PARTIES SEEKING TO USE PEER REVIEW INFORMATION TO PROVE LIABILITY IN MEDICAL MALPRACTICE ACTIONS.**

The general policy behind Idaho's peer review statutes, Idaho Code Section 39-1392 *et seq.*, demonstrates why the statutes are inapplicable in this case. The policy provides guidance as to when the peer review statutes should be appropriately applied – and when they should not. Idaho's peer review statutes are designed to “encourage research, discipline and medical study by certain health care organizations for the purpose of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the state of Idaho.” Idaho Code § 39-1392. The legislative history of the statutes paints a clear picture of the intended application of the peer review protections. The intended breadth of the peer review statutes, and the peer review privilege specifically, is evidenced in the statement of purpose from the original 1973 legislation:

It is essential to the preservation of optimum medical care that the medical profession within Idaho ***be free to review patient care*** and to constantly enforce and improve the standards of medical practice within the state. Such intraprofessional action and review is inhibited and discouraged by present law, however, because of the lack of privilege for any proceedings or records which may be developed and ***the threat that such materials may be obtained by third parties, perhaps misinterpreted and used in litigation, against the practitioner.***

This bill would impose a confidential and privileged status upon certain reports, records and other materials developed by in-hospital medical staff committees, medical society committees and other approved entities concerned with research, discipline and medical study. It would also encourage the free exchange of information in such proceedings by granting civil immunity to persons providing information or opinions to such review and study committees. ***Access to and court room use of individual patients' records would not be affected.***

House Bill 136 Statement of Purpose/ Fiscal Note (1973 Legislative Session) (Emphasis added).

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The original legislation specifically contemplated the need to encourage the exchange of information for continued improvement in **patient care**. The legislature made a specific effort to note that patient care was the primary focus for enacting this legislation. The legislation further contemplates the protections specifically applying to “persons providing information or opinions.”

The purpose in establishing the peer review privilege is to protect a physician and others participating in a review process from liability in a malpractice action. This is confirmed first by the statement that a third party could use the peer review information inappropriately in litigation, i.e., “perhaps misinterpreted and used in litigation, against the practitioner.” *Id.*

A peer review is a “*collection, interpretation and analysis of data by a health care organization for the purpose of bettering the system of delivery of health care or to improve the provision of health care or to otherwise reduce patient morbidity and mortality and improve the quality of patient care.*” Idaho Code § 39-1392a(11) (emphasis added). The mandate is for improvement to medical systems and patient care. The type of information protected from discovery and referenced by the peer review statutes relates to the care of patients, and the activities that revolve around said activities. The statute is not a means by which a hospital can foreclose a physician from challenging inappropriate and wrongful credentialing/reappointment activities. Had the legislature intended otherwise, it would have explicitly drafted the statute to provide for such protections. *See Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631, 635 (2009).

In 1997, the Idaho Legislature revisited Idaho Code Section 39-1392 *et seq.*, amending certain portions of the act. *See* Senate Bill No. 1115. On February 11, 1997, the Senate Health and Welfare Committee discussed the bill and its purpose. Included in the committee minutes is a handout summarizing the purpose of the bill. Recognizing the importance of quality assurance

processes in continued improvement of health care, the proposed amendments were intended to further clarify who was protected under the act and how quality assurance processes are important to the process:

***This information is intended to help physicians improve, but could also be used to discredit a physician in a malpractice suit.*** Unless the information collected on physicians and the opinions they render about their peers is protected from discovery, physicians will refuse to participate in quality assurance programs. Without quality assurance programs, health care quality will suffer.

*Id.* (Emphasis added). The act is designed to protect physicians and those who render opinions about their peers' work from actions brought by third parties—patients. *See Murphy*, 105 Idaho at 183-84, 667 P.2d at 862-63. Secondly, it is designed to elicit continued participation in the peer review process in order to improve patient and medical care by “encourag[ing] a free exchange of medical information that will ultimately benefit the public in the form of improved medical care.” *Murphy v. Wood*, 105 Idaho 180, 184, 667 P.2d 859, 863 (Ct. App. 1983).

Dr. Montalbano's case against these defendants is not a medical malpractice action where a patient is seeking peer review information to prove negligence by the hospital or Dr. Montalbano. There is no third party patient attempting to prove his/her case using internal peer review records. This case is not about Dr. Montalbano's disagreement with an assessment of his care for a patient. This action is akin to a wrongful termination claim. In essence, Dr. Montalbano has alleged that, *inter alia*, SARMC unlawfully suspended his neurosurgical privileges with the hospital that precluded him from practicing at SARMC. Were this a traditional wrongful termination claim, few records would be privileged, if any, and Dr. Montalbano would be entitled to discover those records and materials related to his termination and depose individuals who may have relevant knowledge.

When comparing this action to the language and policy of the peer review statutes, discovery in this case is not impacted by the peer review statutes and should not be limited. Dr.

Montalbano should be permitted to discover information that exposes defendants' bad faith motivations and wrongful conduct, which includes discovery of the underlying reasons for the many inconsistencies in SARMC and Dr. Fox's decisions.

**B. THE FACTUAL RECORD CAN ONLY BE DEVELOPED IF THE MATERIALS, WITNESSES, AND INFORMATION SUPPORTING THE DECISIONS RELATED TO THE PARKS QSTATIM REPORT, MONTALBANO QSTATIM REPORTS, AND DR. MONTALBANO'S SUSPENSION ARE DISCOVERABLE.**

Neither this Court nor Dr. Montalbano can know all the facts surrounding SARMC and Dr. Fox's involvement, motives, communications, and conduct in this matter without production of the materials, witnesses, and information related to SARMC's examination of Dr. Montalbano. The requested information concerns the wrongful actions taken against Dr. Montalbano in suspending his privileges, actions which are not part of the traditional peer review process.<sup>25</sup> Hence, Idaho's peer review statutes are not applicable here.

The list of discoverable information below illustrates that the requested information is much different than "peer review" and speaks directly to the decisions made by SARMC—decisions that are beyond the scope of peer review. Production of the following types of information must be allowed in order for Dr. Montalbano to fairly question SARMC's wrongful suspension of Dr. Montalbano's privileges:

- Information related the Parks Qstatim Report, including
  - the extent to which the triage committee evaluated the information in the Parks Qstatim Report;
  - the extent to which the PPC evaluated the Parks Qstatim Report after the triage committee;
  - the extent to which the Ad Hoc Committee evaluated the Parks Qstatim Report and the thought processes of those individuals who had any

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<sup>25</sup> Confidentiality concerns can be addressed through protective orders. Moreover, patient confidentiality should not be an issue since any time a patient's case requires mentioning in the underlying hospital proceeding that patient's name can be redacted or identified as Patient X.

- involvement with the investigation, decision making, and fact gathering associated with the recommendation;
- the extent to which the MEC evaluated the Parks Qstatim Report and the Ad Hoc Committee's recommendation, as well as the thought processes of those individuals who had any involvement in the decision making and fact gathering associated with the decision to suspend Dr. Montalbano for 90 days;
- the extent to which the Board of Trustees was involved; and
- the relevant documents that were generated.
- Information related to the Montalbano Qstatim Reports, including
  - why there was no triage committee evaluation of the Montalbano Qstatim Reports;
  - the extent to which Dr. Clifford evaluated the Montalbano Qstatim Reports;
  - the charge of the re-commissioned Ad Hoc Committee, the extent to which it evaluated the Montalbano Qstatim Reports, and the thought processes of those individuals who had any involvement with the investigation, decision making, and fact gathering associated with the recommendation;
  - the extent to which the MEC evaluated the Montalbano Qstatim Reports and the Ad Hoc Committee's recommendation, as well as the thought processes of those individuals who had any involvement in the decision making and fact gathering associated with the decision to put Dr. Montalbano under an indefinite precautionary suspension without a fair hearing;
  - the extent to which the Board of Trustees was involved; and
  - the relevant documents that were generated.
- Information related to why Dr. Montalbano was not afforded a fair hearing when the precautionary suspension was for an indefinite period of time.
- Information related to why SARMC did not dismiss the false Parks Qstatim Report.
- Information related to why SARMC did not pursue disciplinary action against Sherry Parks for the false claims and allegations she made in her report.
- Information related to how SARMC and Dr. Fox interpreted, executed and enforced the Bylaws and MSPP that governed the proceedings as to Dr. Montalbano.
- Information related to Dr. Fox's motivation for disclosing confidential information to Dr. Zimmerman.

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The above list is not intended to be comprehensive; it represents the type of information that should be discoverable.

The requested information transcends the peer review process and the explicit purpose of the peer review statutes. It does not implicate the care of any patients nor does it implicate other physicians. Accordingly, Dr. Montalbano requests that this Court find that the requested discovery is not subject to the peer review statutes and overrule SARMC's discovery objections.

**C. IDAHO AND OTHER JURISDICTIONS HAVE RECOGNIZED THE LIMITED NATURE OF PEER REVIEW STATUTES.**

Decisions determining whether a physician has privileges at a hospital do not enjoy the protection of Idaho's peer review statutes. Courts in Idaho, as well as other jurisdictions, permit the discovery of information and materials from a credentialing/privileging challenge.

In *Harrison v. Binnion*, the Idaho Supreme Court recently held that the credentialing decisions<sup>26</sup> of a hospital did not enjoy immunity under Idaho's peer review statutes. 147 Idaho 645, 214 P.3d 631 (2009). *Harrison* arises out of a medical malpractice action. During the course of the litigation, Harrison sought to amend his complaint to include a negligent credentialing claim against SARMC for granting privileges to one of the treating physicians. The district court held that a credentialing claim was barred by Idaho's peer review statutes, Idaho Code Section 39-1392 *et seq.*, thereby denying the amendment to the complaint. *Id.* at 658, 214 P.3d at 634. The district court reasoned that if a health care organization has immunity for using information and opinions when making a credentialing decision, it must likewise have

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<sup>26</sup> The fact that *Harrison* involved a credentialing decision and the present case deals with a suspension of privileges is a distinction without a difference. Specifically, the MSPP discusses the credentials file in Chapter VII. The credentials file is described as follows: "[t]he Credentials File will contain information and documentation pertinent to the Medical Staff application, appointment, reappointment, and formal corrective action concerning each Member." MSPP, Ch. VII, Sec. 2. Accordingly, a suspension of privileges and the associated materials are circumscribed in the credentialing process by virtue of the chapter including the phrase "formal corrective action," to which Dr. Montalbano was subjected.

immunity for the actual credentialing decision made. The Idaho Supreme Court disagreed with the district court and found that “[t]here is nothing in the wording of the statute that purports to grant immunity to a health care organization for making a credentialing decision.” *Id.* at 649, 214 P.3d at 635. The court further clarified that the purpose of the peer review privilege was to shield a person who contributes information or opinions during a peer review activity from “subsequent lawsuit[s] alleging claims such as slander, defamation, tortious interference with contract or prospective advantage, or intentional infliction of emotional distress.” *Id.* The court concluded, “[h]olding that Idaho Code § 39-1392c grants immunity for credentialing decisions would **be an expansion of that statute beyond its wording**. The district court therefore erred in holding that the statute granted such immunity.” *Id.* (emphasis added). The court recognized the underlying public policy of the peer review statutes was to protect those who participated in providing information in traditional peer review activities from civil liability. The *Harrison* court’s holding recognized that the traditional peer review activities relating to patient and medical care are specifically protected, while simultaneously recognizing that credentialing activities did not enjoy the same protection. A hospital’s interpretation and decision on information gathered during credentialing activities is not shielded.

Discovery of underlying credentialing information in a credentialing decision is confirmed by the *Harrison* court’s analogy that often two experts arrive at conflicting opinions after considering the same information. *Id.* at 649, 214 P.3d at 635. To analyze the opinion of the expert—or as here, a health care organization—the underlying information used to arrive at said opinion is necessary. By declaring that the hospital was not immune for its credentialing decision, the court unmistakably confirmed that where a challenge to a credentialing decision is made, the challenger must have an opportunity to discover the information that was provided to any committee and affected any committee decisions. If Section 39-1392b were viewed as an



absolute bar to the discovery of all credentialing information, including a physician discovering his own records that resulted in a loss of staff privileges, the limited grant of immunity under Section 39-1392c would be rendered superfluous. *See Dohl v. PSF Industries, Inc.*, 127 Idaho 232, 899 P.2d 445 (1995) (stating that courts should construe a statute to avoid surplusage or superfluous language). For a court to address an immunity claim under Section 39-1392c, the underlying information must be made available. Had the district court believed that the credentialing records were privileged, further inquiry into the credentialing claim would have been barred. To hold otherwise would render the immunity section of Idaho Code Section 39-1392c meaningless.

*not accurate!*

To further support its holding, the *Harrison* court pointed to the actual statutory language—or lack thereof—granting immunity in credentialing decisions. Specifically, the court stated that to read immunity into credentialing decisions would be an impermissible expansion of the statute. The same justification can be applied to the language of Idaho Code Section 39-1392b. As with the immunity section, the privilege section likewise does not discuss credentialing activities. The same rationale employed by the *Harrison* court in denying immunity to the hospital for credentialing decisions should likewise be applied by this Court in overruling SARMC's discovery objections.

It is important to note that Dr. Montalbano has not named as a defendant any individual who served on any ad hoc committee or hearing panel. The only individual named who was actually involved with the process is Dr. Fox as President of the Medical Staff. Dr. Fox is a named party because of his role in manipulating the information gathered in the process by committees and individuals that led to the wrongful suspension of Dr. Montalbano's privileges. Dr. Montalbano alleges that Dr. Fox was a facilitator and agent of SARMC's plan to wrongfully suspend him. Admittedly, *Harrison* identifies who is likely to be shielded against liability for

any credentialing decisions: “[a] person who provides such information or opinions need not fear a subsequent lawsuit alleging claims such as slander, defamation, tortious interference with contract or prospective economic advantage, or intentional infliction of emotional distress.” *Id.* at 645, 214 P.3d at 635. As explained above, however, the language in *Harrison* regarding who enjoys protection in a credentialing decision is irrelevant in this case.

While it is true that Sherry Parks has been named as a defendant in this case and provided information, she did not serve on any ad hoc committee or hearing panel. Sherry Parks was not involved in any kind of credentialing or privileging decision related to Dr. Montalbano, nor is she a peer of Dr. Montalbano’s who was called upon to review or investigate matters concerning him. Critical to this case is the fact that through her falsified report Sherry Parks initiated the process that began this entire action. Therefore, Sherry Parks was not the type of individual contemplated under *Harrison* to be protected in a credentialing decision.

Dr. Montalbano is not challenging an adverse finding regarding his patient or medical care, since patient care has never been an issue in this case. Dr. Montalbano is challenging SARMC’s wrongful suspension of his privileges that resulted from completely false allegations of disruptive conduct being charged against him. Dr. Montalbano is also challenging SARMC’s wrongful suspension of his privileges for an additional 149 days without being afforded a fair hearing on such a long suspension. Such a challenge necessarily warrants a finding that the peer review statutes are inapplicable in this case. The *Harrison* court recognized that a health care organization cannot enjoy absolute immunity in credentialing matters. Just as in *Harrison*, to fairly question a suspension decision and a decision not to afford a physician a fair hearing, Dr. Montalbano must be given access to the information that led to those decisions. *Harrison* is mandatory Idaho case law that requires this Court to overrule SARMC’s immunity objections.

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The underlying rationale for the holding in *Harrison* also supports this Court overruling SARMC's peer review privilege objections.

The Idaho federal district trial court relied upon underlying credentialing information in considering a motion for summary judgment in a case similar to this case. In *Laurino v. Syringa General Hospital*, the trial court relied on credentialing/privileging materials, including letters, committee minutes, and hearing transcripts, in determining whether to grant defendant's summary judgment motion. No. CIV 98-0439-S-EJL (D. Idaho March 14, 2005) (Order Granting Summary Judgment).<sup>27</sup> Dr. Laurino challenged Syringa General Hospital's decision to terminate his privileges. Dr. Laurino alleged breach of contract, violation of due process, bad faith, tortious interference with prospective economic advantage and/or tortious interference with contract, defamation, emotional distress, and antitrust violations. *Id.* at pg. 3. The hospital filed a motion for summary judgment. In reaching his decision, Judge Lodge, in footnote 2 on page 6 of the order, references letters and board minutes. On page 9, Judge Lodge refers to the transcript of Dr. Laurino's hearing; on page 10 he states that he has "reviewed the transcript and entire record in this matter."

Judge Lodge's reliance on information available only from the credentialing process is evidence that disclosure of credentialing information is vital in cases where physicians are challenging the loss of medical staff privileges.

In *Memorial Hospital For McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), a physician brought both federal and state antitrust actions challenging the actions of a competing group of physicians who allegedly conspired against him in an effort to exclude him from providing competing medical services. The physician alleged that the physicians improperly

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<sup>27</sup> *Laurino v. Syringa General Hospital*, No. CIV 98-0439-S-EJL (D. Idaho March 14, 2005) (Order Granting Summary Judgment) attached to the Affidavit of Raymond D. Powers.

used the organizational structure of the hospital to exclude him from the staff thereby destroying his practice. The physician claimed that the disciplinary proceedings against him were a sham and intended only as a means of implementing a restraint on trade. On that issue, the physician sought discovery regarding defendant's treatment of other doctors in comparable disciplinary proceedings.<sup>28</sup>

The defendants refused to produce the records claiming that such records were privileged under the state's peer review privilege statute. The Court of Appeals recognized that "because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and, where recognized, must be narrowly construed." *Id.* at 1061 (citing *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)). Despite the policy behind the peer review privilege, the court noted that the instant case was *significantly different than a medical malpractice action*. The court noted:

***To recognize hospital review or disciplinary proceedings as privileged in the context of a malpractice action will generally have little impact upon the plaintiff's ability to prove a meritorious claim.*** For the crucial issue in that type of case is not what occurred at the review proceeding, but whether the defendant was in fact negligent in his care and treatment of the plaintiff. . . . More importantly, the exclusion of that information will not prevent the plaintiff from otherwise establishing a valid claim.

***The same cannot be said, however, in a case such as this where the plaintiff's claim arises out of the disciplinary proceedings themselves and not some event or occurrence that exists independently of those proceedings.*** In this case, for example, Dr. Tambone has alleged that the defendants have used the Hospital committee apparatus discriminatorily to deny him staff privileges at the Hospital in furtherance of an unlawful restraint of trade. ***To prove this allegation, Dr. Tambone must present evidence that other physicians with comparable or worse records than his were not denied staff privileges.*** Such evidence, if it exists, would likely be found in the Hospital's records of disciplinary proceedings against other doctors. ***To deny Dr. Tambone access to this information may very well prevent him from bringing this action altogether.***

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<sup>28</sup> Based upon the language of the Illinois peer review statute, the physician had full access to his own peer review records. Rather, at issue was whether the physician was entitled to discover peer review records of other physicians not involved in the lawsuit.

*Id.* at 1062-63. The court went on to deny the privilege and allow the doctor discovery of other physician's peer reviews, concluding that to grant the defendants privilege would in effect "grant such committees, their members and participants **absolute immunity** from prosecution for all statements made and actions taken in the context of such proceedings." *Id.* at 1063 (emphasis added).

*Shadur* poignantly addressed a physician's inability to challenge improperly conducted credentialing/reappointment activities without the aid of discovery of the credentialing/reappointment records. The *Shadur* court recognized the significant distinction between a credentialing case and a medical malpractice case. Specifically, it recognized that a plaintiff patient can still prevail in a medical malpractice action **without** any credentialing materials; whereas a plaintiff physician challenging the credentialing process has no case at all without the ability to discover and review the underlying credentialing/reappointment materials.

The underlying rationale in the above cases supports Dr. Montalbano's position that the peer review statutes are not applicable. The "confidential" nature of the information should not be used to protect from discovery evidence of a process that lacks credibility. Nor should the label given to the process govern the analysis of discoverability; the substance of the information is the critical issue here. SARMC improperly used the organizational structure of the hospital to suspend Dr. Montalbano from the medical staff, thereby damaging his reputation and practice.

As the *Shadur* court explained, Dr. Montalbano would be left with no remedy whatsoever against defendants without access to the underlying information that led to the defendants' wrongful actions. Therefore, this Court must find that the peer review statutes are not applicable and compel SARMC to respond to Dr. Montalbano's discovery requests.

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**D. PUBLIC POLICY DEMANDS THE DISCOVERY OF RECORDS WHERE A PHYSICIAN IS CHALLENGING A PROCESS THAT LACKS CREDIBILITY.**

Denying a physician access to his own records and relevant witnesses to support a claim against an overbearing hospital creates absolute immunity, making the hospital untouchable. In order to avoid this very situation, public policy demands disclosure of credentialing information where a physician is challenging that credentialing decision.

**1. Hospitals And Staff Members Would Have Absolute Immunity In This Type Of Situation If Discovery Of Credentialing/Reappointment Information Is Not Allowed.**

The public policy behind enacting the privilege contradicts the practical effect of extending the privilege to include a physician challenging hospital disciplinary proceedings. If the privilege is extended under these circumstances, it necessarily gives health care organizations and its member's absolute immunity, even for grievous and wrongful actions. In *Shadur*, the court recognized this when it stated, "[t]o recognize hospital disciplinary proceedings as privileged, regardless of the purpose for which disclosure is sought, would in effect grant such committees, their members and participants *absolute immunity* from prosecution for all statements made and actions taken in the context of such proceedings." *Shadur*, 664 F.2d at 1063 (emphasis added). Unlike a medical malpractice action where a patient is still able to prosecute its case despite any peer review records, in a lawsuit such as this, application of the privilege acts as a complete bar to all cases, regardless of any egregious or wrongful conduct by the hospital or committee members. Even if the peer review statutes are applicable, they do not grant absolute immunity, especially in a case where a physician is challenging a suspension based on false allegations and denial of a fair hearing. To hold that the privilege and immunity may be invoked by SARMC under these circumstances will allow any hospital, hospital employee, physician, or committee member to improperly act against another physician without

accountability or repercussion. Simply put, the interests of justice are not served by such a finding nor should the Court condone such an absolute immunity where none is contemplated.

2. **Seventeen States Have Statutory Allowances For Physician Challenges To Decisions Affecting Staff Privileges.**

Seventeen states have sought to address the problem created when a physician is challenging a hospital's decision affecting staff privileges by qualifying confidentiality and non-discoverability statutes. These states have generally made an allowance in their "non-discoverability" statutes by permitting a physician to obtain access to materials when challenging the curtailment, suspension, termination or denial of staff privileges. In those states, contesting a revocation or curtailment of staff privileges by the accused physician places a much heavier burden on the committee to perform a fair and honest review of a physician's performance. The following states have adopted such an allowance: **Alaska** (Alaska Stat. 18.23.030), **Arizona** (Ariz. Rev. Stat. 32-1451), **California** (Cal. Bus. & Prof. Code 809.2), **Colorado** (Colo. Rev. Stat. 12-36.5-104(10)(b)(I-IV)), **Connecticut** (Conn. Gen. Stat. 19a-17b(d)), **Hawaii** (Haw. Rev. Stat. 663-1.7), **Illinois** (225 Ill. Comp. Stat. 60/5), **Kansas** (Kan. Stat. Ann. 65-4915(4)(c)), **Kentucky** (Ky. Rev. Stat. Ann. 311.377), **Louisiana** (La. Rev. Stat. Ann. 13:3715.3), **Mississippi** (Miss. Code. Ann. 41-63-9(2)), **Missouri** (Mo. Rev. Stat. 537.035), **New Hampshire** (N.H. Rev. Stat. Ann. 317-A:17), **Oregon** (Or. Rev. Stat. 441.055 and 41.675), **Rhode Island** (R.I. Gen. Laws 23-17-25), **South Dakota** (S.D. Cod. Laws 36-4-26.1), **Washington** (Wash. Rev. Code 70.41.200).

While Idaho has not specifically adopted any such allowance, the fact that many other states have recognized the inherent problem with denying a physician his credentialing/privileging records is persuasive evidence that the purpose of the statutes is to shield from liability persons supplying information in medical malpractice cases. The privilege

and immunity protections are inapplicable and should not be used to deny a physician challenging the reappointment process from discovering his own information.

3. **The Health Care Quality Improvement Act Does Not Recognize A Peer Review Privilege, Which Is Consistent With Federal Courts General Disfavor Of Privileges.**

In 1986, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. § 11101 et seq. ("HCQIA"), which was inspired by the congressional finding that "[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." 42 U.S.C.A. § 11101(5). Consideration of HCQIA is important to the instant motion given that in SARMC's Bylaws it defers to HCQIA if there are inconsistencies between its Bylaws and any HCQIA requirements. The federal Act and congressional intent underlying the Act should not be lightly cast aside since SARMC and Dr. Fox have invoked HCQIA as an affirmative defense. While the purpose of this motion is not to provide a discussion on the requirements and proof required under HCQIA, it is important to understand that for defendants to invoke HCQIA as an affirmative defense requires reliance upon the very information they seek to prevent from disclosure to prove the HCQIA elements.

HCQIA provides qualified immunity from suit to officials who conduct professional review activities that meet the standards outlined in the statute. Yet Congress, in providing protection for those involved in the professional review activity, did not establish a privilege to documents and information created in that process. In analyzing HCQIA, the *Teasdale* court declared that the legislature:

[N]ot only considered the importance of maintaining the confidentiality of the peer review process, but took the action it believed would best balance protecting confidentiality with other important interests. Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA.



*Teasdale v. Marin General Hosp.*, 138 F.R.D. 691, 694 (N.D. Cal. 1991); *see also In re: Administrative Subpoena Blue Cross Blue Shield of Massachusetts, Inc.*, 400 F. Supp. 2d 386 (D. Mass. 2005) (finding that although state law recognized medical peer review privilege, Congress chose not to include medical peer review privilege in HCQIA since HCQIA already provided for qualified immunity from suit for those participating in peer reviews and where documents would have been subject to protective order); *Syposs v. United States*, 63 F. Supp. 2d 301 (W.D.N.Y. 1999) (finding that neither reason nor experience justified extending to peer review records a privilege against disclosure where Congress declined to create such a privilege in connection with enactment of HCQIA).

Congress was mindful of the relevant competing interests, even though it declined to create a privilege for medical peer review materials in HCQIA. The findings set forth in section 11101(5) demonstrate Congress' appreciation for the need to provide incentive and protection for physicians engaging in professional review activities. *Id.* at § 11101. The Supreme Court's position is that trial courts should be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990).

Congress' determination that a medical peer review privilege is unnecessary is further confirmation that Idaho's peer review privilege should be rendered inapplicable in this case and disclosure allowed. This conclusion is further supported by the many states that have adopted allowances for the discovery of credentialing/reappointment information, the Idaho Supreme Court's holding in *Harrison* regarding credentialing decisions, and the Idaho federal court's reliance on the similar records in *Laurino*.

While not binding on Idaho courts, it is significant that federal courts have continually disfavored any evidentiary privilege, recognizing only a handful of applicable privileges under

the federal rules. Evidentiary privileges remain disfavored and should not be lightly created. *United States v. Nixon*, 418 U.S. 683, (1974). The United States Supreme Court has cautioned that privileges “contravene the fundamental principle that the public ... has a right to every man's evidence.” *Univ. of Pa. v. EEOC*, 493 U.S. 182, (1990) (alteration in original) (internal quotation marks omitted). There is a presumption against privileges that may only be overcome when it would achieve a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel v. United States*, 445 U.S. 40, 50, 100 (1980). This is a high standard, and “only the most compelling candidates will overcome the law's weighty dependence on the availability of relevant evidence.” *Pearson v. Miller*, 211 F.3d 57, 67 (3rd Cir. 2000).

In *University of Pennsylvania v. EEOC*, 493 U.S. 182, (1990), the Supreme Court held that neither federal common law nor the First Amendment warranted the recognition of a privilege for the peer review materials of a university. It cautioned that courts should be ***“especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.”*** *Id.* at 189 (emphasis added). The EEOC subpoenaed the tenure review files of a woman denied tenure and five male faculty members who allegedly were beneficiaries of the disparate treatment. In rejecting the University's privilege claim, the court noted that testimonial privileges are exceptions to the principle that “the public has a right to every man's evidence” and are to be construed strictly.” *Id.* The court pointed to Congress' failure to create a privilege for peer review documents in extending Title VII of the Civil Rights Act of 1964 to educational institutions. *Id.* at 189-92.

Holding true to the sentiment expressed by the Supreme Court, Dr. Montalbano should have a right to SARMC's evidence, especially in light of the fact that Congress refused to create an identical privilege when it created the Health Care Quality Immunity Act.

#### **IV. CONCLUSION**

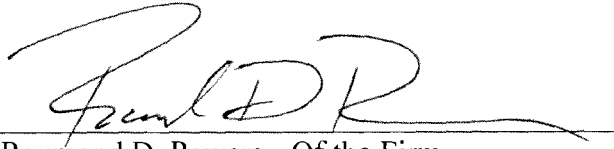
The search for the truth begins with the production of all the relevant information surrounding the decisions to suspend Dr. Montalbano's neurosurgical privileges and, in one instance, deny him a right to a fair hearing. If Dr. Montalbano is denied access to the very information that would expose defendants' bad faith and wrong-doing against him, the search for the truth never begins. The defendants are then free to manipulate and control the information related to the process, activities, and decisions surrounding that process to protect against Dr. Montalbano's challenges. Those who have fostered this process and allowed it to play out should be held accountable and to do so requires overruling the defendants' privilege and immunity objections.

Based upon the foregoing arguments, the peer review statutes are not applicable to this case. Therefore, plaintiffs respectfully request that the Court order that 1) the peer review privilege in Idaho Code Section 39-1392b is inapplicable, 2) the immunity in Idaho Code Section 39-1392c is inapplicable, 3) prohibits SARMC, absent exceptional circumstances, from raising peer review privilege and immunity objections in further discovery, and 4) compels SARMC to produce the information Dr. Montalbano has requested in his interrogatory nos. 1, 3-5, 10, 11 13-24; requests for production nos. 1, 2, 4, 5, 7-33; and request for admissions nos. 17-33, 37-39, 45-100, 102-05, 107-09, 111-15, 117-18 to which SARMC has objected, but has not fully responded asserting peer review privilege and immunity objections.

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DATED this 20<sup>th</sup> day of January, 2010.

POWERS TOLMAN, PLLC

By   
Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of January, 2010, I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF INFORMATION RELATED TO SARMC'S WRONGFUL SUSPENSION OF DR. MONTALBANO'S PRIVILEGES**, by the method indicated below, and addressed to each of the following:

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Fax: 388-1300

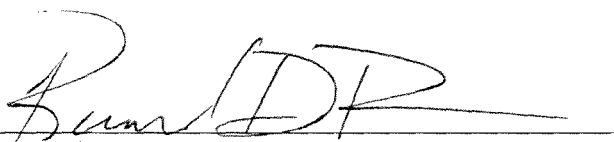
*Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks and  
Donald Fox, M.D.*

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J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

Attorneys for Defendants Saint Alphonsus Regional Medical Center,  
Sherry Parks, and Donald Fox, M.D.

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS SAINT ALPHONSUS,  
DR. FOX AND PARKS'S MOTION  
FOR PROTECTIVE ORDER AND  
MOTION TO STRIKE**

Defendants Saint Alphonsus Regional Medical Center, Sherry Parks, and Donald Fox, M.D., by and through their counsel of record Givens Pursley LLP, move this Court pursuant to Idaho Rule of Civil Procedure 26(c) to issue a Protective Order finding the peer review materials Plaintiff seeks through his Motion to Compel are privileged under Idaho Code § 39-1392 *et seq.* and other Idaho law and not subject to discovery, including depositions, or admissions into

evidence before this Court. This Motion is made on the grounds that Idaho Code § 39-1392 *et seq.* protects such peer review materials sought by Plaintiff from discovery and admission into evidence in any court for any reason. Defendants further seek an order striking peer review records and information submitted by Plaintiff in support of his motion to compel. Through this Motion, Defendants seek to obtain and enforce the protections afforded by Idaho's peer review and immunity statutes to the fullest extent permitted by law.

DATED this 3<sup>rd</sup> day of February, 2010.



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Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.

CERTIFICATE OF SERVICE

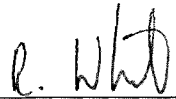
I HEREBY CERTIFY that on the 3<sup>rd</sup> day of February, 2010, I caused to be served a true copy of the foregoing **Motion for Protective Order and Motion to Strike**, by the method indicated below, and addressed to each of the following:

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*Attorneys for Paul Montalbano, M.D.*

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- ☒ Telecopy
- ☐ Electronic Mail

  
\_\_\_\_\_  
Robert B. White

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A.M. \_\_\_\_\_ P.M. *CP 3*

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Attorneys for Defendants Saint Alphonsus Regional Medical Center,  
Sherry Parks, and Donald Fox, M.D.

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS SAINT ALPHONSUS,  
DR. FOX, AND PARKS'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PROTECTIVE  
ORDER AND MOTION TO STRIKE**

**I. INTRODUCTION**

Plaintiff Paul J. Montalbano, M.D. filed an Amended Complaint against Defendants Saint Alphonsus Regional Medical Center, Christian G. Zimmerman, M.D., Donald Fox, M.D., and Sherry Parks ("Defendants") seeking relief for allegedly wrongful acts committed during Saint



Alphonsus' peer review of Dr. Montalbano. Dr. Montalbano subsequently filed a Motion to Compel Production of Information Related to the Wrongful Suspension of Dr. Montalbano's Privileges. Specifically, Dr. Montalbano seeks an order overruling the peer review privilege and immunity objections asserted by Saint Alphonsus in its discovery responses. Dr. Montalbano further asserts that Idaho law supports a finding that the peer review privilege and immunity statutes are inapplicable, allowing for discovery of information related to the activities and decisions concerning Dr. Montalbano and the wrongful suspension of his privileges.

Saint Alphonsus (on behalf of itself, and Defendants Dr. Fox, Dr. Zimmerman, and Parks)<sup>1</sup> seeks a Protective Order regarding the peer review materials as well as an order striking peer review records submitted by Dr. Montalbano in support of his motion to compel. By doing so, Saint Alphonsus seeks to obtain and enforce the protections afforded by Idaho's peer review privilege and immunity statutes.

Although prompted by the exchange of initial discovery in the case, all parties seek a ruling by the Court establishing the extent of the peer review and immunity protection governing the claims and defenses raised, and which will provide guidance throughout the balance of this litigation. This memorandum is submitted in support of Saint Alphonsus' motions.<sup>2</sup>

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<sup>1</sup> Givens Pursley LLP does not represent Dr. Zimmerman in this matter. However, Defendant Saint Alphonsus asserts and seeks the protection of the peer review privilege and immunity statutes for the entire peer review process. As Idaho Code § 39-1392d provides that "all peer review records of a health care organization shall be the property of the health care organization concerned which obtains or compiles the same" it is appropriate for Saint Alphonsus to seek protection of the peer review privilege and immunity on behalf of all named Defendants in this lawsuit.

<sup>2</sup> Saint Alphonsus notes this Memorandum is submitted in support of its Motions for a Protective Order and to Strike Dr. Montalbano's submissions in support of his Motion to Compel. This Memorandum is not intended as an opposition to Dr. Montalbano's Motion to Compel, although the arguments may very well be applicable to such an opposition. Pursuant to Idaho Rule of Civil Procedure 7, Saint Alphonsus will file its opposition to Dr. Montalbano's Motion to Compel seven (7) days prior to the hearing on his motion.

## **II. OVERVIEW OF CASE AND BRIEF STATEMENT OF FACTS**

The Idaho legislature mandates that every hospital conduct peer review activities, including causing its medical staff to organize in-hospital committees which shall review the professional practices of members of the hospital's medical staff for the purpose of reducing morbidity and mortality, and for the improvement of the care of the hospital's patients. Idaho Code § 39-1392f. Peer review is also a condition of participation in the Medicare program. 42 C.F.R. 482.21. The policy behind these legislative mandates is to encourage research, discipline, and medical study by health care organizations, and to enforce and improve the standard of medical practice in Idaho. See Idaho Code § 39-1392. Participation by independent physicians on the medical staffs at Idaho hospitals in reviewing their peers and colleagues' professional practice, including at Saint Alphonsus, is largely a voluntary activity. Participation in these critical organized peer review activities may require many hours of uncompensated time outside of the physicians' professional clinical practice to carefully and candidly review matters, exercising their best professional judgment under the circumstances to ensure clinical quality is being protected and served through their critical review. To facilitate the legislative mandate and accomplish the objectives of the law, including this candid participation by physicians, Idaho has established a peer review privilege and immunity from liability for peer review activity. Idaho Code §§ 39-1392b and 39-1392c.

Saint Alphonsus is a 381-bed, Boise-based medical center subject to the above-referenced mandates of the Idaho legislature regarding peer review activities. It serves the communities and citizens of Southwest Idaho, Eastern Oregon, and Northern Nevada.

Dr. Montalbano is a neurosurgeon, specializing in spine surgery, practicing medicine in Boise. (Complaint ¶ 1.) Dr. Montalbano has possessed Medical Staff membership and certain clinical privileges at Saint Alphonsus since 2000. (Complaint ¶ 7.)

Pursuant to its statutory obligation to conduct peer review and consistent with its Medical Staff Bylaws, Saint Alphonsus commenced a peer review of Dr. Montalbano in 2008 based on allegations of disruptive behavior, of which Dr. Montalbano had a history with Saint Alphonsus. This peer review process was thorough, exhaustive, and consistent with the Medical Staff Bylaws. It required countless hours of the voluntary Medical Staff leadership and appointed committees to review voluminous medical information concerning Dr. Montalbano's alleged disruptive behaviors. Dr. Montalbano was afforded every opportunity provided in the Medical Staff Bylaws to participate and challenge the recommended actions of the Medical Staff in this process.

While there is a long history of events relevant to the evaluation of Dr. Montalbano's disruptive behavior, Defendants will necessarily focus on Saint Alphonsus' peer review process itself. Saint Alphonsus does not wish to waive the peer review privilege and in order to avoid any suggestion that the peer review privilege has been waived by Defendants, Defendants will confine their description of the process to matters alleged by Dr. Montalbano in his Complaint. Specifically, the Saint Alphonsus Medical Executive Committee (the "MEC") commissioned a committee to review certain issues in April 2008 (Complaint ¶ 17), and in August 2008, the MEC accepted certain recommendations. (Complaint ¶ 25.) In December 2008, Dr. Montalbano sent letters to Dr. David Gough regarding Dr. Zimmerman and Dr. Fox. Based on Dr. Montalbano's complaints, the commissioned committee met and made a recommendation to the MEC in January 2009. (Complaint ¶¶ 36-37.) Consistent with the Saint Alphonsus Medical

Staff Fair Hearing Plan, a hearing was held before the Fair Hearing Panel in February 2009 during which sworn testimony of witnesses was heard (Complaint ¶ 42); the Fair Hearing Panel upheld the recommendation of the MEC. (Complaint ¶ 44.) As was his right, in May 2009, Dr. Montalbano appealed the recommendation of the Fair Hearing Panel. (Complaint ¶ 46.)

In June 2009, the appellate review panel, and ultimately the Saint Alphonsus Board of Trustees, reviewed and affirmed the MEC recommendation. (Complaint ¶ 47.)

The participants in the peer review decisions exercised his or her best professional judgment. Plaintiff has served discovery requests on Saint Alphonsus, including interrogatories, requests for production, and requests for admissions, seeking detailed information about the peer review process. Saint Alphonsus objected to the discovery on the grounds that peer review proceedings are privileged under Section 39-1392b, and that the participants are immune for actions taken in the process pursuant to Section 39-1392c. Saint Alphonsus seeks a Protective Order protecting the peer review privilege and immunity afforded by Idaho's peer review statutes, and further seeks an Order striking peer review records submitted by Dr. Montalbano in this litigation.

### **III. ARGUMENT**

#### **A. Peer Review Records and Activity Are Privileged and Confidential Under Idaho Law.**

The Idaho peer review statutes clearly outlines the scope of peer review activities, the privileged nature of peer review information, and the very limited exceptions to the privilege which are not applicable in this matter:

- “Peer review” includes “[c]redentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization,” and any “[p]rofessional review action, meaning an action . . . of a health care organization which is taken or made in the

conduct of peer review . . . “ Idaho Code § 39-1392a(11)(a), (c). ***This is precisely the type of case for which peer review protection was enacted.***

- “[A]ll peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony thereto be admitted in evidence, or in any action of any kind in any court . . . for any purpose whatsoever.” Idaho Code § 39-1392b. ***Discovery and depositions related to the peer review process are expressly prohibited.***
- The Idaho legislature made specific exceptions to the peer review privilege for patient care records and allowed the use of certain peer review information in personal injury cases in a code section titled “LIMITED EXCEPTIONS TO PRIVILEGE AND CONFIDENTIALITY.” Idaho Code § 39-1392e. ***Any exception not enacted by the legislature deviation from the judiciary’s proper role in enforcing unambiguous statutory law.***

The language in the peer review statutes is plain and unambiguous. “If [a] statute is not ambiguous, th[e] Court does not construe it, but simply follows the law as written.” *McLean v. Maverick Country Stores, Inc.*, 135 P.3d 756, 759 (Idaho 2006); *see also Murphy v. Wood*, 667 P.2d 859 (Idaho Ct. App. 1983). While it is, of course, true that peer review privilege and immunity apply to certain third-party claims, by law, peer review materials are not discoverable or admissible in “any action of any kind in any court . . . for any purpose whatsoever,” Idaho Code § 39-1392b, save for the narrow statutory exceptions in Section 39-1392e.

In enacting and implementing a broad peer review privilege, Idaho is promoting the same public policy considerations that are well recognized by courts and commentators, including the policy goal of promoting candor and willing participation by qualified, busy physicians in the often uncomfortable, time-consuming, and voluntary process of evaluating a peer, for the overall good of reducing morbidity and mortality and improving the quality of care to the community.

See e.g. *Vranos v. Franklin Med. Ctr.*, 862 N.E.2d 11, 18 (Mass. 2007) (“We have recognized that the intent of these confidentiality provisions is ‘[t]o “promote candor and confidentiality” in the peer review process...and to “foster aggressive critiquing of medical care by the provider’s peers” ’ ” (citation omitted)); *Claypool v. Mladineo*, 724 So.2d 373, 383 (Miss. 1998) (explaining peer review privilege statutes provide the confidentiality necessary “to permit quality assurance control and review of activities in a hospital”); *Coburn v. Seda*, 677 P.2d 173, 178 (Wash. 1984) (explaining peer review privilege statutes “prohibit discovery of records on the theory that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review”); *Donnell v. HCA Health Servs.*, 28 P.3d 420, 432 (Kan. Ct. App. 2001) (explaining purpose of state peer review immunity statute is to “encourage hospitals to actively engage in peer review of staff physicians” (quoting *Lemuz v. Fieser*, 933 P.2d 134, 144 (Kan. 1997))); see generally Ronald G. Spaeth, Kelley C. Pickering, & Shannon M. Web, *Quality Assurance & Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures* 12 ANNALS HEALTH L. 235, 240-43 (2003); Susan O. Scheutzwow & Sylvia Lynn Gillis, *Confidentiality & Privilege of Peer Review Information: More Imagined than Real* 7 J. L. & HEALTH 169, 169-76 (1992-1993) (“The fear of becoming embroiled in lawsuits as a result of candid discussion within the peer review process is recognized as a deterrent to effective peer review.”); see also 40A Am. Jur. 2d *Peer review; privilege and immunity* § 23 (2008); Alissa Marie Bassler, Comment, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege* 39 IDAHO L. REV. 689 (2002-2003).

The relevant considerations are perhaps best summarized by the Arizona Court of Appeals in *Yuma Regional Medical Center v. Superior Court*, 852 P.2d 1256 (Ariz. Ct. App.

1993), a case in which the Court refused to allow an interrogatory asking for nothing more than the identity of persons present at a peer review proceeding. That court observed:

Important policy considerations underlie the protection afforded by the peer review privilege. The legislature has mandated that peer reviews be conducted "for the purposes of reducing morbidity and mortality and for the improvement of the care of patients. . . ." A.R.S. § 36-445. However, doctors are somewhat reluctant to engage in peer review.

Review by one's peers within a hospital is not only time consuming, unpaid work, it is also likely to generate bad feelings and result in unpopularity. . . .

***Consequently, these reviews will effectively terminate if they are subject to unlimited discovery processes.***

*Yuma Regional Medical Center*, 852 P.2d at 1259 (citations omitted) (emphasis added).

If the physicians who participate in peer review proceedings (such as Dr. Fox, who has been sued by Dr. Montalbano in this very litigation for serving on Saint Alphonsus's Medical Executive Committee) are subject to subpoena, document discovery, deposition, and the looming threat of suit, they will be unwilling to engage in the very activities the statutory scheme is designed to promote and the purposes sought to be achieved by Idaho Code will be obliterated. The privilege is "intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying out its peer review function." *Claypool*, 724 So.2d at 383 (quoting *Cruger v. Love*, 599 So.2d 111, 114-15 (Fla. 1992)). The potential chilling effect of Dr. Montalbano's litigation strategy is precisely the reason he is not permitted to obtain Saint Alphonsus's peer review files, and is not allowed to eviscerate the privilege by deposing and otherwise harassing witnesses who contributed their valuable time and energies to the process to improve the quality of the region's health care. For

good reason, Idaho's peer review statutes apply to this case, and those statutes should be enforced as written.

Given that the written discovery propounded upon Saint Alphonsus is only the first volley of discovery in this case, and that Dr. Montalbano has announced his intention to depose individuals with knowledge of the review process, Saint Alphonsus requests a protective order that provides that Section 39-1392b means what it says, and that Dr. Montalbano is not entitled to inquire into "peer review records," or any "testimony relating thereto." Idaho Code § 39-1392b. *See* Idaho R. of Civ. P. 26(c) (where appropriate, a court can enter a protective order "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters"); *Frost v. Hofmeister*, 97 Idaho 757, 762 (1976) (discussing protective order barring deposition questions concerning grand jury testimony). The relief is necessary and appropriate, and flows directly from denial of Plaintiff's Motion to Compel.

**B. The Court Should Strike the Portions of Plaintiffs' Submissions that Are "Peer Review Records" as that Term is Defined in Section 39-1392a of the Idaho Code.**

As discussed above, "peer review records" are defined as "all evidence of interviews, reports, statements, minutes, memoranda, notes, investigative graphs and compilations and the contents thereof, and all physical materials relating to peer review of any health care organization." Idaho Code § 39-1392a(12). Peer review records "shall not be directly or indirectly . . . admitted as evidence . . . in any action of any kind." Idaho Code § 39-1392b.

Here, in an effort to bootstrap an exception to this statutory peer review privilege, Dr. Montalbano has filed peer review records which are inadmissible. Pursuant to Section 39-1392b, those materials should be stricken from the record. Specifically, Saint Alphonsus objects to, and request that the Court strike, the following peer review records:



- Portions of Exhibit A to the Affidavit of Raymond D. Powers dated January 20, 2010, specifically Saint Alphonsus's responses to Requests for Admission Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 102, 103, 104, 105, 107, 108, 109, 111, 112, 113, 114, 115, 117, and 118;
- Portions of Exhibit B to the Affidavit of Raymond D. Powers dated January 20, 2010, specifically Saint Alphonsus's answers to Interrogatory Nos. 3, 5, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24;
- Portions of Exhibit B to the Affidavit of Raymond D. Powers dated January 20, 2010, specifically Saint Alphonsus's responses to Requests for Production Nos. 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, and 33;
- Exhibit D to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Parks Qstatim Report dated April 1, 2008;
- Exhibit E to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Janelle Reilly to Dr. Montalbano dated August 26, 2008;
- Exhibit F to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. Montalbano to Drs. Estess, Mallea, and Cushman, Sandra Bruce, and Joan Weddington dated June 24, 2008;
- Exhibit G to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. Montalbano to Drs. Fox, Estess, Cushman, and Mallea, Sandra Bruce, and Joan Weddington dated August 6, 2008;
- Exhibit H to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. Montalbano to Dr. David Gough dated December 2, 2008 regarding Dr. Zimmerman;
- Exhibit I to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. Montalbano to Dr. David Gough dated December 2, 2008 regarding Dr. Fox;
- Exhibit J to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. Clifford to Dr. Montalbano dated December 18, 2008;
- Exhibit K to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Letter from Dr. David Gough to Dr. Montalbano dated December 23, 2008;

- Exhibit L to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Re-Commissioned Ad Hoc Committee Report dated January 14, 2009;
- Exhibit M to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Testimony of Jeanne Parker from the Fair Hearing, pages 579-81; and
- Exhibit N to the Affidavit of Raymond D. Powers dated January 20, 2010, described as the Fair Hearing Panel recommendation dated March 23, 2009.

All of the foregoing selectively chosen exhibits fall squarely within the definition of "peer review records," Section 39-1392a(12), and the Court should immediately order them stricken and removed from the court files. In addition, the Court should strike the "Background Information" presented by Plaintiff at pages 7 to 20 of his Memorandum. Not only are peer review records confidential and privileged, but so is "testimony relating thereto." Idaho Code § 39-1392b. At a minimum, the Court should place those portions of the motion under seal to preserve the confidentiality of the peer review process.

#### IV. CONCLUSION

For the foregoing reasons, Defendants Saint Alphonsus, Dr. Donald Fox, and Sherry Parks respectfully request the Court enter orders properly implementing Title 39, Chapter 13 of the Idaho statutes governing peer review.

DATED this 3rd day of February, 2010.



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Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of February, 2010, I caused to be served a true copy of the foregoing **Defendants Saint Alphonsus, Dr. Fox, And Parks' Memorandum In Support Of Motion For Protective Order And Motion To Strike**, by the method indicated below, and addressed to each of the following:

Raymond D. Powers  
Powers Tolman, PLLC  
345 Bobwhite Court, Ste #150  
P.O. Box 9756  
Boise, ID 83707  
Facsimile: (208) 577-5101  
*Attorneys for Paul Montalbano, M.D.*

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Telecopy
- ☐ Electronic Mail

Andrew C. Brassey  
Bradley S. Richardson  
Brassey, Wetherell & Crawford, LLP  
203 W. Main Street  
PO Box 1009  
Boise, ID 83701-1009  
Facsimile: (208) 344-7077  
*Attorneys for Christian G. Zimmerman, M.D.*

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Telecopy
- ☐ Electronic Mail

DATED this 3rd day of February, 2010.

R. White  
Robert B. White

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:31

FEB 04 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**STIPULATION FOR ENTRY OF  
PROTECTIVE ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties, by and through their respective counsel, that subject to the approval of the Court, a Protective Order shall be issued in this action regarding certain documents and information produced during discovery. The undersigned hereto intend to produce documents, respond to written discovery

and provide certain testimony which they believe may contain or constitute material, non-public, sensitive information or proprietary information. The parties desire that such confidential material be protected by virtue of designating such materials as confidential and restricting its dissemination. This Stipulation for Entry of Protective Order is without prejudice to any party moving the Court for different or additional protection for specified documents or categories of documents.

### **DEFINITIONS**

1. As used herein:
  - a. "Designating Party" means any Person who designates Material as Confidential Material.
  - b. "Discovering Counsel" means counsel of record for the Discovering Party.
  - c. "Discovering Party" means the Party to whom Material is being provided by a Producing Party.
  - d. "Confidential Material" means any material designated as CONFIDENTIAL in accordance with the terms of this Stipulation for Entry of Protective Order.
  - e. "Material" means any documents, testimony or information in any form or medium whatsoever, including without limitation, any written or printed matter and electronic records provided in this action by a Party before or after the date of a Protective Order.
  - f. "Party" means the Parties to this action, their attorneys of record and their agents and representatives.

- g. “Person” means any individual, corporation partnership, unincorporated association, governmental agency, or other business or government entity, whether a Party or not.
- h. “Producing Party” means any Person who provides Material during the course of this action.
- i. “Provide” means to produce any Material, whether voluntarily or involuntarily, whether pursuant to request or process, and whether in accordance with the Idaho Rules of Civil Procedure (“IRCP”) or otherwise.

#### **CONFIDENTIAL DESIGNATION**

2. A Producing Party may designate as “CONFIDENTIAL” any Material provided to a Party that the Producing Party in good faith believes contains or discloses any of the following:

- a. Material, non-public, sensitive information, or other proprietary information; and
- b. Information that the Party is under a duty to preserve as confidential under an agreement with or other obligation to another Person.

3. A Producing Party shall stamp as “CONFIDENTIAL” all Materials that the Producing Party in good faith believes are entitled to protection pursuant to the standards set forth in paragraph 2 of this Stipulation. A Producing Party may designate Confidential Material for protection by any of the following methods:

- a. By identifying the Material with reasonable specificity before permitting the Discovering Counsel to inspect it or copy it.

- b. By physically marking each page of the protected Material "CONFIDENTIAL" prior to providing it to a Party; or
- c. By identifying with specificity in writing to the Discovering Party any previously provided Material, which was not designated as "CONFIDENTIAL" prior to it having been provided. For purposes of this method of designation, it will be a sufficiently specific identification to refer to bates numbers or deposition page numbers of previously provided Material. Where a Producing Party designates previously provided Material as Confidential Material pursuant to this subparagraph, the Producing Party will follow the procedures set forth in the previous subparagraph for designating Confidential Matters, and provide to the Discovering Party additional copies of the previously provided Material marked with the inscription described in the previous subparagraph. Upon receipt of the additional copies, which comply with the procedures set forth in the previous subparagraph, the Discovering Party will immediately return to the Producing Party the previously provided Material, or alternatively, will destroy all the previously provided Material at the option of the Producing Party. For previously provided Material that was not designated as Confidential Material at the time of its being provided, a Protective Order shall apply to such materials beginning on the date that the Producing Party makes such designation.

**RESTRICTION OF USE OF CONFIDENTIAL MATERIAL**

- 4. Confidential Material shall not be disclosed, nor shall its contents be disclosed, to any person other than those described in paragraph 7 and other than in accordance with the

terms, conditions and restrictions set forth herein. The Parties agree that they will not use any Material provided in this action for any purpose other than this action.

5. Confidential Material provided by a Producing Party to a Discovering Party shall not be used by the Discovering Party or anyone other than the Producing Party, specifically including the persons identified in paragraph 7, for any purpose, including, without limitation, any personal business, governmental, commercial, or litigation (administrative or judicial) purpose, other than the prosecution or defense of this action.

6. All Confidential Material shall be kept secure by Discovering Counsel and access to Confidential Material shall be limited to persons authorized pursuant to paragraph 7 of this Stipulation.

7. For purposes of the preparation of this action, and subject to the terms, conditions, and restrictions of this stipulation, Discovering Counsel may disclose Material designated as "CONFIDENTIAL" and the contents of Material designated as "CONFIDENTIAL" only to the following persons:

- a. Counsel of record working on this action on behalf of any party and counsel's employees who are directly participating in this action, including counsel's partners, associates, paralegals, assistants, secretaries, and clerical staff;
- b. Court reporters and their staff;
- c. The Court and any Person employed by the Court whose duties require access to Confidential Material;
- d. Witnesses at depositions or pre-trial proceedings, in accordance with procedures set forth in paragraphs 9-11;



- e. Non-party experts, consultants and investigators assisting counsel with respect to this action and their secretarial, technical and clerical employees, including copy services, who are actively assisting in the preparation of this action, in accordance with the procedures set forth in paragraphs 9-11;
- f. Officers, directors and employees of the Parties hereto who have a need to review Confidential Material to assist in connection with this litigation, subject to the limitations set forth herein;
- g. Photocopy service personnel who photocopied or assisted in the photocopying or delivering of documents in this litigation;
- h. Any Person identified on the face of any such Confidential Material as an author or recipient thereof; and
- i. Any Person who is determined to have been an author and/or previous recipient of the Confidential Material, but is not identified on the face thereof, provided there is prior testimony of actual authorship or receipt of the Confidential Material by such Person.

#### **UNDERTAKING TO BE BOUND**

8. Before Discovering Counsel may disclose Confidential Material to any Person described in subparagraphs 7(e) or 7(f) above, the Person to whom disclosure is to be made shall read a copy of this Stipulation for Entry of Protective Order, shall evidence his or her agreement to be bound by its terms, conditions, and restrictions, by signing an acknowledgement in the form attached hereto as Exhibit A (the "Acknowledgment"), and shall retain a copy of this stipulation, with a copy of his or her signed Acknowledgment attached. Discovering Counsel

shall keep a copy of the signed Acknowledgement for each person described in subparagraphs 7(e) or 7(f) to whom Discovering Counsel discloses Confidential Material.

### **DEPOSITIONS**

9. Those portions of depositions taken by any Party at which any Confidential Material is used or inquired into, may not be conducted in the presence of any Person(s) other than (a) the deposing witness, (b) his or her counsel, and (c) Persons authorized under paragraph 7 of this stipulation to view such Confidential Material.

10. Counsel for any deponent may designate testimony or exhibits as Confidential Material by indicating on the record at the deposition that the testimony of the deponent or any exhibits to his or her testimony are to be treated as Confidential Material. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential Subject to Protection Pursuant to Court Order." Counsel for any Party may designate exhibits in which that Party has a cognizable interest as Confidential Material by indicating on the record at the deposition that such exhibit(s) are to be treated as Confidential Material. Failure of counsel to designate testimony or exhibits as confidential at deposition, however, shall not constitute a waiver of the protected status of the testimony or exhibits. Within thirty (30) days of receipt of the transcript of the deposition or thirty (30) days of the date on which the Court enters the Protective Order, whichever occurs last, counsel shall be entitled to designate specific testimony or exhibits as Confidential Material. If counsel for the deponent or Party fails to designate the transcript or exhibits as Confidential within the above described thirty-day period, any other Party shall be entitled to treat the transcript or exhibits as non-confidential material. For purposes of this paragraph 10, this Stipulation for Entry of Protective Order shall be deemed "effective" on the date on which it has been executed by all counsel for the Parties.

11. When Material disclosed during a deposition is designated Confidential Material at the time testimony is given, the report shall separately transcribe those portions of the testimony so designated, shall mark the face of the transcript in accordance with paragraph 3 above, and shall maintain that portion of the transcript or exhibits in separate files marked to designate the confidentiality of their contents. The reporter shall not file or lodge with the Court any Confidential Material without obtaining written consent from the Party who designated the Material as Confidential Material. For convenience, if a deposition transcript or exhibits contained repeated references to Confidential Material, which cannot conveniently be segregated from non-confidential material, any Party may request that the entire transcript or exhibit maintained by the reporter as Confidential Material.

**USE OF CONFIDENTIAL MATERIAL IN PLEADINGS AND OTHER COURT PAPERS**

12. If any Party files with the Court any pleadings, interrogatory, answer, affidavit, motion, brief, or other paper containing, appending, summarizing, excerpting or otherwise embodying Confidential Material, the pleading or other paper in which the Confidential Material is embodied shall be filed and maintained under seal and shall not be available for public inspection. The Party marking the filing shall be responsible for filing the pleading or other paper in a sealed envelope, with a cover sheet stating:

**CONFIDENTIAL – this document is subject to a PROTECTIVE ORDER in *PAUL J. MONTALBANO, M.D. v. SAINT ALPHONSUS REGIONAL MEDICAL CENTER, SHERRY PARKS, CHRISTIAN G. ZIMMERMAN, M.D., and DONALD FOX, M.D.*, District Court Case No.: CV OC 0914805, and may not be examined or copied except by the Parties, their respective counsel of record, or by Court Order.**

### **OBJECTIONS TO DESIGNATION**

13. Any Party may at any time notify the Designating Party in writing of its contention that specified Material designed as Confidential Material is not properly so designated because such Material does not meet the standards set forth in paragraph 2 of this Stipulation for Entry of Protective Order. The Designating Party shall, within five court days, meet and confer in good faith with the Party challenging the designation in an attempt to resolve such dispute. The Challenging Party shall have 20 calendar days from the conclusion of the meet and confer to file a motion challenging the designation of the Material in question. If no motion is filed within the 20-day period, or any mutually agreed to extension of time, all Parties shall treat the Material as designated. If a motion challenging the designation is filed, the Designating Party must show by a preponderance of the evidence that there is good cause for the designation as Confidential Material. Pending resolution of any motion filed pursuant to this paragraph, all Persons bound by this Stipulation for Entry of Protective Order shall continue to treat the Material that is the subject of the motion as Confidential Material.

### **RETURN OF MATERIAL**

14. Within 90 calendar days after the final settlement or termination of this action, Discovering Counsel shall return or destroy (at the option and expense of Producing Counsel) all Materials provided by a Producing Party and all copies thereof except to the extent that any of the foregoing includes or reflects Discovering Counsel's work product, and except to the extent that such Material has been filed with a court in which proceedings related to this action are being conducted. In addition, with respect to any such retained work product and unless otherwise agreed to, at the conclusion of these actions, counsel for each Party shall store in a secure area all work product which embodies Confidential Material together with all of the signed undertakings they are required to preserve pursuant to paragraph 8 above, and shall not

make use of such Material except in connection with any action arising directly out of this action, or pursuant to a court order for good cause shown. The obligation of the Protective Order shall survive the termination of this action. To the extent that Confidential Materials are, or become, known to the public through no fault or action of the Discovering Party, such Confidential Materials shall no longer be subject to the terms of this Stipulation for Entry of Protective Order. Upon request, counsel for each party shall verify in writing that they have complied with the provisions of this paragraph.

#### **SCOPE OF PROTECTIVE ORDER**

15. Except for the provisions regarding post-trial or post-settlement return and destruction of material, or segregation of work product that embodies Confidential Material, Protective Order is strictly a pretrial order; it does not govern the trial of this action.

16. Counsel agrees to meet and confer concerning the use at trial of Confidential Material.

17. Nothing in this herein shall be deemed to limit, prejudice, or waive any right of any Party or Person (a) to resist or compel discovery with respect to, or to seek or to obtain additional or different protection for, Material claimed to be protected work product or privileged under Idaho law, Material as to which the Producing Party claims a legal obligation not to disclose, or Material required to be provided pursuant to Idaho law; (b) to seek to modify or obtain relief from any aspect of this Stipulation for Entry of Protective Order; (c) to object to the use, relevance, or admissibility at trial or otherwise of any Material, whether or not designated in whole or in part as Confidential Material governed by this Stipulation for Entry of Protective Order; or (d) otherwise to require that discovery be conducted according to governing laws and rules.

18. By stipulating to the terms contained herein, Defendants are in no way waiving the protections afforded by Idaho Code § 39-1392b and other law on peer review materials, testimony, rights and protections, which are expressly asserted by Defendants in this proceeding.

19. Designation of Material as Confidential Material on the face of such Material shall have no effect on the authenticity or admissibility of such material at trial.

20. This Stipulation for Entry of Protective Order shall not preclude any Person from waiving the applicability of this stipulation with respect to any Confidential Material provided by that Person or using any Confidential Material provided by that Person or using any Confidential Material owned by that Person in any manner that Person deems appropriate.

21. This Stipulation for Entry of Protective Order shall not affect any contractual, statutory or other legal obligation of the rights of any Party or Person with respect to Confidential Material designated by that Party.

22. If at any time any Confidential Material protected by this Stipulation for Entry of Protective Order is subpoenaed from the Discovering Party by any Court, administrative or legislative body, or is requested by any other Person or entity purporting to have authority to require the production of such material, the Party to whom the subpoena or other request is directed shall immediately give written notice thereof to the Producing Party with respect to the Confidential Material sought and shall afford the Producing Party at least five (5) business days to pursue formal objections to such disclosures.

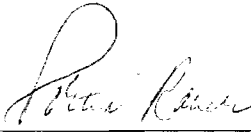
#### **SUBMISSION TO THE COURT**

23. The Parties agree to submit this Stipulation for Entry of Protective Order to the Court for adoption as an order of the Court.

24. The Parties reserve the right to seek, upon good cause, modification of the Protective Order by the Court.

DATED this 4<sup>th</sup> day of February, 2010.

POWERS TOLMAN, PLLC

By 

---

Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff

000170

DATED this 27 day of January, 2010.

GIVENS PURSLEY, LLP


By R. White

Robert B. White - Of the Firm  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks and  
Donald Fox, M.D.



DATED this 4<sup>th</sup> day of February, 2010.

BRASSEY, WETHERELL & CRAWFORD, LLP

By   
\_\_\_\_\_  
Andrew C. Brassey - Of the Firm  
Attorneys for Defendant Christian G.  
Zimmerman, M.D.

# **EXHIBIT A**

**000173**

### **ACKNOWLEDGEMENT**

I acknowledge that I have been provided a copy of the attached Protective Order and that I have read and understand the same. I further agree to be bound by the terms of such Order with respect to all Confidential Material that may be disclosed or provided to me and I recognize that at the conclusion of this action all Confidential Material must be either returned to the party by whom such Confidential Material was provided, or destroyed (at the option and expense of the Producing Party).

\_\_\_\_\_  
Signature

Printed or Typed Name:

\_\_\_\_\_  
Date \_\_\_\_\_

000174

RECEIVED

FEB 04 2010

Ada County Clerk

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FEB 05 2010

J. DAVID NAVARRO, Clerk  
By Ada Navar  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**PROTECTIVE ORDER**

**THIS MATTER** having come before the Court upon the parties' Stipulation for Entry of Protective Order, and the Court being fully advised in the premises and good cause appearing therefore;

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the terms of the Stipulation for Entry of Protective Order entered into by the parties shall be, and hereby are, **APPROVED**. The Court enters this Protective Order and adopts the terms of the Stipulation.

DATED this 5<sup>th</sup> day of February, 2010.

By Deborah A. Bail  
DEBORAH A. BAIL  
District Judge

000175

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5<sup>th</sup> day of February, 2010, I caused to be served a true copy of the foregoing **PROTECTIVE ORDER**, by the method indicated below, and addressed to each of the following:

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Portia L. Rauer  
POWERS TOLMAN  
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Boise, ID 83706  
Fax No.: 577-5101  
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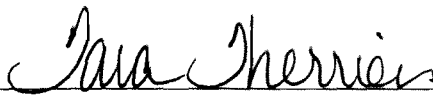
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Deputy Clerk of the Court

000176

ORIGINAL

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A.M. \_\_\_\_\_ FILED 434 P.M.

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IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS SAINT  
ALPHONSUS'S, DR. FOX'S, AND  
PARKS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO COMPEL**

**I. INTRODUCTION**

Plaintiff Paul J. Montalbano, M.D. has filed a Motion to Compel Production of Information Related to the Wrongful Suspension of Dr. Montalbano's Privileges. Specifically, Dr. Montalbano seeks an order overruling the peer review privilege and immunity objections asserted by Saint Alphonsus in its discovery responses. Dr. Montalbano further asserts that

**DEFENDANTS SAINT ALPHONSUS'S, DR. FOX'S, AND PARKS' MEMORANDUM IN OPPOSITION  
TO PLAINTIFF'S MOTION TO COMPEL - 1**

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Idaho law supports a finding that the peer review privilege and immunity statutes are inapplicable here, allowing for discovery of information related to the activities and decisions concerning Dr. Montalbano and the suspension of his privileges. Also pending before this Court is Saint Alphonsus's<sup>1</sup> motion for Protective Order seeking to protect its peer review materials and Motion to Strike peer review records submitted by Dr. Montalbano in support of his motion to compel. Saint Alphonsus submitted a Memorandum in Support of its Motion for Protective Order and Motion to Strike.

This Memorandum is submitted in opposition to Dr. Montalbano's Motion to Compel. To avoid duplication, and because the issue presented is one of law, Saint Alphonsus will not repeat its recitation of the facts in the case. Instead, Saint Alphonsus refers to, and incorporates by reference, the overview and brief statements of facts included in its Memorandum in Support of its Motion for Protective Order and Motion to Strike.

## **II. ARGUMENT**

### **A. Peer Review Records and Activity Are Privileged and Confidential Under Idaho Law.**

The Idaho peer review statutes clearly outlines the scope of peer review activities, the privileged nature of peer review information, and the very limited exceptions to the privilege which are not applicable in this matter:

- "Peer review" includes "[c]redentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization," and any

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<sup>1</sup> Saint Alphonsus filed its Motion for Protective Order and Motion to Strike on behalf of itself, and Defendants Dr. Fox, Dr. Zimmerman, and Parks. Givens Pursley LLP does not represent Dr. Zimmerman in this matter. However, Saint Alphonsus asserts and seeks the protection of the peer review privilege and immunity statutes for the entire peer review process. As Idaho Code § 39-1392d provides that "all peer review records of a health care organization shall be the property of the health care organization concerned which obtains or compiles the same" it is appropriate for Saint Alphonsus to seek protection of the peer review privilege and immunity on behalf of all named Defendants in this lawsuit.

“[p]rofessional review action, meaning an action . . . of a health care organization which is taken or made in the conduct of peer review . . . .” Idaho Code § 39-1392a(11)(a), (c). *This is precisely the type of case for which peer review protection was enacted.*

- “[A]ll peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony thereto be admitted in evidence, or in any action of any kind in any court . . . for any purpose whatsoever.” Idaho Code § 39-1392b. *Discovery and depositions related to the peer review process are expressly prohibited.*
- The Idaho legislature made specific exceptions to the peer review privilege for patient care records and allowed the use of certain peer review information in personal injury cases in a code section titled “LIMITED EXCEPTIONS TO PRIVILEGE AND CONFIDENTIALITY.” Idaho Code § 39-1392e. *Any exception not enacted by the legislature deviation from the judiciary’s proper role in enforcing unambiguous statutory law.*

The language in the peer review statutes is plain and unambiguous. “If [a] statute is not ambiguous, th[e] Court does not construe it, but simply follows the law as written.” *McLean v. Maverick Country Stores, Inc.*, 135 P.3d 756, 759 (Idaho 2006); *see also Murphy v. Wood*, 667 P.2d 859 (Idaho Ct. App. 1983). While it is, of course, true that peer review privilege and immunity apply to certain third-party claims, by law, peer review materials are not discoverable or admissible in “any action of any kind in any court . . . for any purpose whatsoever,” Idaho Code § 39-1392b, save for the narrow statutory exceptions in Section 39-1392e.

In enacting and implementing a broad peer review privilege, Idaho is promoting the same public policy considerations that are well recognized by courts and commentators, including the policy goal of promoting candor and willing participation by qualified, busy physicians in the often uncomfortable, time-consuming, and voluntary process of evaluating a peer, for the overall



good of reducing morbidity and mortality and improving the quality of care to the community. See e.g. *Vranos v. Franklin Med. Ctr.*, 862 N.E.2d 11, 18 (Mass. 2007) (“We have recognized that the intent of these confidentiality provisions is ‘[t]o “promote candor and confidentiality” in the peer review process...and to “foster aggressive critiquing of medical care by the provider’s peers” ’ ” (citation omitted)); *Claypool v. Mladineo*, 724 So.2d 373, 383 (Miss. 1998) (explaining peer review privilege statutes provide the confidentiality necessary “to permit quality assurance control and review of activities in a hospital”); *Coburn v. Seda*, 677 P.2d 173, 178 (Wash. 1984) (explaining peer review privilege statutes “prohibit discovery of records on the theory that external access to committee investigations stifles candor and inhibits constructive criticism thought necessary to effective quality review”); *Donnell v. HCA Health Servs.*, 28 P.3d 420, 432 (Kan. Ct. App. 2001) (explaining purpose of state peer review immunity statute is to “encourage hospitals to actively engage in peer review of staff physicians” (quoting *Lemuz v. Fieser*, 933 P.2d 134, 144 (Kan. 1997))); see generally Ronald G. Spaeth, Kelley C. Pickering, & Shannon M. Web, *Quality Assurance & Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures* 12 ANNALS HEALTH L. 235, 240-43 (2003); Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality & Privilege of Peer Review Information: More Imagined than Real* 7 J. L. & HEALTH 169, 169-76 (1992-1993) (“The fear of becoming embroiled in lawsuits as a result of candid discussion within the peer review process is recognized as a deterrent to effective peer review.”); see also 40A Am. Jur. 2d *Peer review; privilege and immunity* § 23 (2008); Alissa Marie Bassler, Comment, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege* 39 IDAHO L. REV. 689 (2002-2003).

The relevant considerations are perhaps best summarized by the Arizona Court of Appeals in *Yuma Regional Medical Center v. Superior Court*, 852 P.2d 1256 (Ariz. Ct. App. 1993), a case in which the Court refused to allow an interrogatory asking for nothing more than the identity of persons present at a peer review proceeding. That court observed:

Important policy considerations underlie the protection afforded by the peer review privilege. The legislature has mandated that peer reviews be conducted “for the purposes of reducing morbidity and mortality and for the improvement of the care of patients. . . .” A.R.S. § 36-445. However, doctors are somewhat reluctant to engage in peer review.

Review by one’s peers within a hospital is not only time consuming, unpaid work, it is also likely to generate bad feelings and result in unpopularity. . . .

***Consequently, these reviews will effectively terminate if they are subject to unlimited discovery processes.***

*Yuma Regional Medical Center*, 852 P.2d at 1259 (citations omitted) (emphasis added).

If the physicians who participate in peer review proceedings (such as Dr. Fox, who has been sued by Dr. Montalbano in this very litigation for serving on Saint Alphonsus’s Medical Executive Committee) are subject to subpoena, document discovery, deposition, and the looming threat of suit, they will be unwilling to engage in the very activities the statutory scheme is designed to promote and the purposes sought to be achieved by Idaho Code will be obliterated. The privilege is “intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying out its peer review function.” *Claypool*, 724 So.2d at 383 (quoting *Cruger v. Love*, 599 So.2d 111, 114-15 (Fla. 1992)). The potential chilling effect of Dr. Montalbano’s litigation strategy is precisely the reason he is not permitted to obtain Saint Alphonsus’s peer review files, and is not allowed to eviscerate the privilege by deposing and otherwise harassing witnesses who contributed their

valuable time and energies to the process to improve the quality of the region's health care. For good reason, Idaho's peer review statutes apply to this case, and those statutes should be enforced as written.

Dr. Montalbano is not entitled to inquire into "peer review records," or any "testimony relating thereto." Idaho Code § 39-1392b. *See* Idaho R. of Civ. P. 26(c) (where appropriate, a court can enter a protective order "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters"); *Frost v. Hofmeister*, 97 Idaho 757, 762 (1976) (discussing protective order barring deposition questions concerning grand jury testimony). Therefore, Dr. Montalbano's Motion to Compel should be denied.

**B. Dr. Montalbano's Asserted "Need" for Expansive Discovery of Peer Review Materials Is Not Grounds for Eviscerating the Privilege.**

Dr. Montalbano argues that the factual record can only be developed if the materials, witnesses, and information supporting the decisions related to his suspension of privileges are discoverable. Without exception, the requested discovery seeks peer review records and related information that are expressly protected from discovery by Section 39-1392b.

There is a temptation for Saint Alphonsus to waive the peer review privilege and oppose Dr. Montalbano's theories and other allegations, and the legislature has given Saint Alphonsus license to use peer review information in its own defense if it so chooses (*see* Section 39-1392e(f)). However, doing so would subject the medical staff at Saint Alphonsus to the very sort of discovery and recrimination from which they are meant to be insulated by Section 39-1392b. For the policy reasons articulated above, Saint Alphonsus will not, for the sake of expediency, do this to the individuals who have participated in the "time consuming, unpaid work" involved in peer review. The residual effect of this action would be to erode the quality of care Saint Alphonsus offers.

A desire to “know all of the facts” is not an exception to a privilege; if it were, the “exception” would swallow the rule whole. By definition privileges apply to bar the discovery and use of potentially relevant information. Privileges are justified by a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). Again, peer review privilege statutes are intended “to promote the public health, safety and welfare and to provide for basic standards of care and treatment of hospital patients.” *Claypool*, 724 So. 2d at 383 (quoting *Shelton v. Morehead Mem’l Hosp.*, 347 S.E.2d 824, 828 (N.C. 1986)). This important public policy outweighs an individual physician’s need to find the supposed “truth” concerning his personal financial affairs, and it bars the discovery sought by Dr. Montalbano in this case. See *Vranos*, 862 N.E.2d at 18 (“[T]he interests of the general public in quality health care are elevated over the interest of individual health care providers in unfettered access to information about peer review of their actions.”).

**C. Idaho’s Peer Review Statutes Are “Limited” Only to the Extent of the Limitations Established by the Legislature.**

Dr. Montalbano argues that “[c]ourts in Idaho, as well as other jurisdictions, permit the discovery of information and materials from a credentialing/reappointment challenge.” The majority of the argument is directed to interpretation of the decision in *Harrison v. Binnion*, 214 P.3d 631 (Idaho 2009), with a limited number of cases from other jurisdictions.

As has been stated herein, the peer review privilege is a creature of statute in Idaho. The statutes at issue are plain and unambiguous, and do not allow for “creative interpretations” or “public policy exceptions” that are directed to advancing Dr. Montalbano’s personal financial interests. By definition, the privilege applies to the review of Dr. Montalbano and any resulting

limitations on his ability to practice at Saint Alphonsus, and the privilege precludes the discovery sought by Dr. Montalbano in his motion.

*Harrison v. Binnion* is **not** a case about the peer review privilege, or what discovery is and is not proper under Section 39-1392b – which are the issues presented by Dr. Montalbano’s Motion. Saint Alphonsus disagrees with Dr. Montalbano’s reading of *Harrison*, which is a case in which an injured patient was seeking leave to sue Saint Alphonsus for allowing a physician to practice at the hospital, not a challenge to the peer review process itself. *See Harrison*, 214 P.3d at 633-34. The peer review privilege is not even **mentioned** in *Harrison* (except in the dissent to acknowledge the “confidentiality of peer review materials,” *see Harrison*, 214 P.3d at 645 (Horton, J., dissenting in part)), and the decision does not support a common law exception to the statutory privilege against the discovery sought by Dr. Montalbano.

Similarly, the summary judgment ruling dismissing a claim similar to Dr. Montalbano’s in *Laurino v. Syringa General Hospital*, No. 98-0439-S-EJL (D. Idaho 2005) says nothing about peer review privilege. By law, a hospital such as Syringa is free to use peer review materials to defend itself against a practitioner’s claim. Idaho Code § 39 -1392e(f). Saint Alphonsus does not know how or why the materials referenced in the *Laurino* order were obtained or considered, but there is no suggestion Judge Lodge was asked to interpret or enforce Section 39-1392b. The conclusions Dr. Montalbano seeks to draw from the *Laurino* order cannot be found in the case.

The Seventh Circuit case Dr. Montalbano cites, *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), applying federal law to a federal antitrust claim, is simply a *non sequitur*; there is, and can be, no argument that federal privilege law applies here. Contrary to the heading preceding Dr. Montalbano’s argument, nothing in the cited cases “recognizes the limited nature” of Idaho’s peer review privilege.

**D. Dr. Montalbano's "Public Policy" Arguments Are Best Directed to the Legislature.**

Dr. Montalbano argues "public policy" demands this Court disregard the peer review privilege. He argues that a privilege against discovery of peer review materials will result in "absolute immunity," that a number of other states have enacted exceptions for physician challenges to credentialing decisions, and that federal law does not provide a comparable privilege. These policy arguments have no merit and do not change Idaho law.

*First*, the statutory limitation on discovery does not establish "absolute immunity." The law establishes a privilege, but limited judicial review of a credentialing decision is available in an appropriate case under the principles announced by the Idaho Supreme Court in *Miller v. St. Alphonsus Regional Medical Center*, 87 P.3d 934 (Idaho 2004), which provides for a determination of whether the peer review process afforded due process to the practitioner. *Miller*, 87 P.3d at 834-35. Here, there is no dispute Dr. Montalbano (with the benefit of counsel) had the opportunity to present evidence and arguments at a full hearing; Dr. Montalbano disagrees with the ultimate decision, but he fully availed himself of the process to challenge the recommendations of the Medical Staff in the process. Dr. Montalbano's is not confronting "absolute immunity," only a claim that fails under *Miller* and *Laurino*.

*Second*, statutory exceptions enacted by other states do not apply to an Idaho proceeding brought by an Idaho plaintiff against Idaho defendants applying Idaho law. Without discussing the nuances of the laws in the 17 states that have allegedly enacted exceptions, Idaho is not one of them, nor are the other 32 states that are not discussed by Dr. Montalbano. The existence of specific exceptions under Section 39-1392e, coupled with the absence of the exception advocated by Dr. Montalbano, defeats the arguments being made to this Court. *See Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) ("[W]here the legislature has

included certain exceptions to the [general rule], the doctrine of *expressio unis est e exclusio alterius* counsels against judicial recognition of additional exceptions.”).

*Third*, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 (“HCQIA”) provides qualified immunity to persons and entities who participate in professional review activities, but the fact that Congress did not provide an additional privilege does not vitiate the Idaho privilege. “HCQIA allows individual states to provide even further protection to medical peer review activities.” *Roe v. Walls Reg’l Hosp., Inc.*, 21 S.W.3d 647, 652 (Tex. Ct. App. 2000) (applying state qualified immunity law and peer review privilege statute, barring discovery of “records and proceedings of a medical peer review committee,” in a physician’s defamation and negligence lawsuit against a hospital); *see also Patrick v. Burget*, 486 U.S. 94, 106 n.8 (1988) (“The Act expressly provides that it does not change other ‘immunities under law,’ § 11115(a), including the state-action immunity, thus allowing States to immunize peer-review action that does not meet the federal standard.”); 40A AM. JUR. 2D *Peer review; privilege and immunity* § 24 (2008) (“The immunity provisions of the HCQIA are not intended to preempt any state laws providing greater protection.”).

Ultimately, Dr. Montalbano simply wants Idaho law to be different than it is. Section 39-1392b of Idaho Code provides broad protection to peer review proceedings by barring discovery and excluding evidence. These protections foster candor and assist hospitals in securing the grudging participation of physicians that is critical to “enforcing and improving the standards of medical practice in the state of Idaho,” Section 39-1392, which is the ultimate goal of peer review. Saint Alphonsus has raised proper objections, the peer review laws should be enforced, and Dr. Montalbano’s Motion to Compel should be denied.

### III. CONCLUSION

For the foregoing reasons, Saint Alphonsus respectfully request the Court enter orders properly implementing Title 39, Chapter 13 of the Idaho statutes governing peer review.

DATED this 10<sup>th</sup> day of February, 2010.

*R. White*

---

Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10<sup>th</sup> day of February, 2010, I caused to be served a true copy of the foregoing **Defendants Saint Alphonsus's, Dr. Fox's, And Parks' Memorandum In Opposition To Plaintiff's Motion To Compel**, by the method indicated below, and addressed to each of the following:

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**REPLY IN SUPPORT OF  
PLAINTIFF'S MOTION TO  
COMPEL PRODUCTION OF  
INFORMATION RELATED TO  
SARMC'S WRONGFUL  
SUSPENSION OF DR.  
MONTALBANO'S PRIVILEGES**

**COMES NOW**, Plaintiff PAUL J. MONTALBANO, M.D. (Dr. Montalbano), by and through his attorneys of record, POWERS TOLMAN, PLLC, and submits this reply in support of his motion to compel production of information relevant to St. Alphonsus Regional Medical Center's (SARMC) wrongful suspension of his privileges.

## INTRODUCTION

Dr. Montalbano moved this Court for an order that 1) the peer review privilege in Idaho Code § 39-1392b is inapplicable to the instant action, 2) the immunity in Idaho Code Section 39-1392c is inapplicable, 3) prohibits SARMC from raising peer review and immunity objections in future discovery, and 4) compels SARMC to produce the information requested in Dr. Montalbano's interrogatories, requests for production, and requests for admission. Defendants argue that their objections are valid because the provisions of Idaho Code Sections 39-1392 *et seq.* apply to protect the requested information from disclosure. Defendants have separately moved this Court for a protective order to prevent Dr. Montalbano's access to peer review information. Defendants, however, have completely ignored the legislative intent surrounding the Idaho peer review statutes and have failed to refute that this case is very different than a patient seeking peer review information in a medical malpractice action. Defendants have also failed to refute the fact that absolute immunity is created if Dr. Montalbano is not allowed access to his own peer review information. Defendants are relying solely upon public policy arguments and insist that this Court read the statute in a vacuum, without concern for the consequences.

As Dr. Montalbano argued in his opposition to Defendants' motion for protective order, when the statutes are read as a whole and in conjunction with the legislative purpose, it is clear that the legislature did not intend to keep a physician from discovering information related to challenging privileging decisions. Furthermore, Defendants' own Bylaws and MSPP provide for the disclosure of the peer review information upon consent by the physician. Additional support for Dr. Montalbano's position can also be found in the Idaho Supreme Court's recent holding in *Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631 (2009). Supporting case law from other jurisdictions also supports finding that the peer review privilege is not applicable as written. These cases, and the underlying public policy, highlight that the peer review privilege should not

be expanded to protect Defendants when it is the physician who is challenging the internal hospital proceeding in which a physician challenges his own peer review process. The obvious result of such an expansion is absolute immunity to Defendants that puts them above the law.

Dr. Montalbano articulated his position with regard to statutory construction and the applicability of the peer review statutes to this proceeding in his opposition to Defendants' motion for protective order. He incorporates those arguments herein by reference. Some of those arguments will be reproduced in this memorandum to support Dr. Montalbano's position that the peer review statutes are inapplicable and do not govern the instant action.

### ARGUMENT

A. THE PEER REVIEW STATUTES ARE INAPPLICABLE GIVEN THE LEGISLATIVE PURPOSE AND PUBLIC POLICY UNDERLYING THE STATUTES.

A statute must be construed **so as to give effect to the intent of the legislature.** *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 207, 108 P.3d 349, 354 (2005) (emphasis added). A statute need not be ambiguous in order for this Court to examine the legislature's intent in enacting it. *Id.* To determine statutory intent, not only the literal words of the statute, but the reasonableness of the proposed construction, the public policy behind the statute, and its legislative history must be examined. *Doe v. Boy Scouts of America*, Nos. 35639 and 35681, 2009 WL 5101498 (Idaho, Dec. 29, 2009).

As Dr. Montalbano has argued in his motion to compel and in his response to Defendants' motion for protective order, the legislative intent of the peer review statutes was to protect the peer review process from use by third parties in medical malpractice actions. The obvious public policy behind the legislative intent was to protect health care providers from **public** scrutiny of every case where there was an unfortunate outcome and to encourage physicians to learn from one another in a protected setting without fear that third parties would

use the information against the practitioner in a medical malpractice action. Defendants have completely ignored this language as if it never existed. Because Defendants have failed to address this important part of statutory construction, their argument that the peer review statutes are unambiguous must also be ignored. A reading of the statute must be reconciled with the legislative intent so that the intent of legislature is honored.

Instead of addressing the legislative intent, Defendants desire that the focus remain on public policy. Defendants argue that the public policy behind the peer review process will be compromised if Dr. Montalbano is allowed access to his peer review information because physicians will no longer be willing to participate in the peer review process. In string citations, without discussion, Defendants have cited a few cases and articles to support their position. Strikingly, however, many of the cases and the journals they have cited relate to medical malpractice actions. As expected, the rationale and analysis of the courts in *Yuma Medical Center*, *Coburn*, and *Claypool* support finding peer review protection since those cases were brought by third parties seeking information from the peer review process related to their medical malpractice claims. *Yuma Medical Center v. Superior Court*, 852 P.2d 1256 (Ariz. Ct. App. 1993); *Coburn v. Seda*, 677 P.2d 173 (Wash. 1984)); *Claypool v. Mladineo*, 724 S.2d 373 (Miss. 1998). Because the holdings in these cases are medical malpractices actions, the cases are distinguishable on the facts and do not provide any helpful instruction.

In the journals cited by Defendants, the authors framed their public policy arguments with medical malpractice in mind. For example, authors Spaeth, Pickering and Web point out that “without this privilege plaintiffs would be able to use any and all quality control and peer review documents, created by physicians, **against physicians in a medical malpractice action**.

. . . Clearly, access to care, quality or not, is being threatened by the repercussions of the current medical malpractice process.” Ronald G. Spaeth, Kelley C. Pickering, and Shannon M Web.

*Quality Assurance & Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures*, 12 Annals Health L. 235, 244-45 (2003) (emphasis added). The authors of this particular article suggest in their conclusion that “to promote effective quality control processes in health care, there must be a federally enacted cap on all medical malpractice non-economic damages.” *Id.* at 247. In *Confidentiality & Privilege of Peer Review Information: More Imagined than Real*, the authors note that “[i]nformation presented to peer review committees and the deliberations of such committees may be useful to plaintiffs and defendants in malpractice actions.” 7 J.L. & Health, 169, 174. Again, as these authors demonstrate, it is the threat of medical malpractice actions that drives the peer review privilege.

The cases and journals cited by Defendants actually support Dr. Montalbano’s position because he agrees that the peer review privilege should be in place to protect peer review information in medical malpractices cases, as was, and is, the intent of the legislature in creating the protection in the first place. With regard to Dr. Montalbano’s situation, however, allowing discovery of peer review documents would have the effect of exposing those motivated by malice and discouraging their participation. Thus, the purpose of the privilege would be served by eliminating persons abusing the process. The interest in facilitating the prevention of sham peer reviews by providing perhaps the only evidence that can establish its occurrence outweighs the interest in promoting candor in the medical review process.

Defendants made a cursory attempt to refute Dr. Montalbano’s argument on absolute immunity and the public policy arguments against a result which would create such immunity. Defendants make only the conclusory statement that a statutory limitation on discovery does not establish absolute immunity. They reference *Miller v. St. Alphonsus Reg’l Med. Ctr.*, 139 Idaho 825, 87 P.3d 934 (2004) in support of their statement. The *Miller* case is factually distinct from this case because it deals with a physician who has submitted an initial credentialing application

and was denied privileges; however, the case does not address absolute immunity nor does it address the peer review privilege. Defendants are correct that the *Miller* case addresses whether due process was afforded the practitioner in the peer review process. Dr. Montalbano disagrees, however, with Defendants' characterization that he was afforded due process. That is an argument best left for another day.

In their briefing, Defendants have argued that Dr. Montalbano's financial position or personal financial interests should not outweigh public policy. To be clear, Dr. Montalbano brought this suit against Defendants for their wrongful conduct and to expose their bad faith, improper motives, and ill will towards him. This is not a medical malpractice action. Dr. Montalbano has been damaged and is entitled to a remedy for those damages. Public policy is not advanced by disparaging Dr. Montalbano for claiming a remedy for his damages, nor is public policy advanced by permitting Defendants to hide their wrongful conduct.

Dr. Montalbano takes issue with Defendants' statement that Dr. Montalbano "simply wants Idaho law to be different than it is." What Dr. Montalbano wants is access to peer review information from a peer review process where he is challenging the decision to wrongfully suspend his privileges. Access to his own records in what amounts to an operational business-type decision has not been statutorily prohibited. The statutory prohibition is against patients who seek peer review records to pursue medical malpractice actions. This distinction is critical to the analysis. It should not be forgotten that a plaintiff patient can pursue his/her action against the health care provider without obtaining peer review information; Dr. Montalbano will not be allowed that same opportunity if he is denied access to the information he seeks.

Defendants' objections to Dr. Montalbano's discovery requests are improper and they should be compelled to fully answer Dr. Montalbano's discovery requests without seeking unwarranted protection from the peer review statutes.

**B. OTHER COURTS HAVE ALLOWED THE DISCOVERY OF PEER REVIEW INFORMATION.**

Other courts have specifically addressed the peer review statutes in cases where physicians have challenged hospital decisions regarding staff privileges. In *Hayes v. Mercy Health Corp.*, 739 A.2d 114 (Pa. 1999), Dr. Hayes challenged the hospital's suspension of his privileges. *Id.* at 115. In its decision allowing the discovery of peer review information, the court focused on the intent of the Pennsylvania statute which sought to keep peer review proceedings confidential. The statute states, in part, that peer review proceedings are to remain confidential "in any civil action . . . arising out of the matters which are the subject of evaluation and review by such committee." *Id.* The court interpreted the language of the statute to mean that it was intended "to prevent the disclosure of peer review information to outside parties seeking to hold professional health care providers liable for negligence, **while at the same time ensuring . . . confidentiality did not operate to shield from discovery those rare instances in which the peer review process was misused.**" *Id.* at 118 (emphasis added). Furthermore, Dr. Hayes' challenge of the suspension did not arise out of the substantive issue of patient care. *Id.* at 117. The court recognized that peer review statutes were originally enacted to protect parties contributing to the peer review process from third parties alleging negligence via their participation.

The *Hayes* court recognized that there were situations in which the confidentiality provision did not apply, especially where a protection is not expressly worded in the statute. The court recognized that the issues at stake were the fairness and integrity of the peer review proceedings and whether the plaintiff-physician was the victim of bad faith.

A similar result was reached by the federal trial court in Oklahoma where it recognized that disclosure of peer review records is appropriate when a physician challenges a sham peer



review process. In *Cohlmia v. Ardent Health Services, LLC*, 448 F. Supp. 2d 1253 (N.D. Okla. 2006), plaintiff alleged numerous state and federal claims. The defendants, in turn, filed a motion to dismiss for failure to state a claim and sought privilege and confidentiality protection under Oklahoma's peer review statutes. The district court observed that federal antitrust claims had been alleged and that exclusion of "relevant and possibly crucial evidence by application of the [peer review] privilege" ran against strong public policy. *Id.* at 1273. In finding the peer review privilege inapplicable, the court further noted that allowing discovery of the peer review materials was especially appropriate given the allegations of sham peer review proceedings. *Id.* *Cohlmia* recognizes, then, that peer review records are essential to a physician challenging a sham peer review process.

While *Hayes* and *Cohlmia* are not binding, they illustrate that other jurisdictions have recognized the limited application of peer review statutes and have been willing to find the statutes inapplicable.

Defendants have made an attempt to distinguish several of the cases previously cited by Dr. Montalbano. Defendants suggest that *Harrison v. Binnion* is not applicable to the present case because *Harrison* does not mention peer review and arose from a medical malpractice action. 147 Idaho 645, 214 P.3d 631 (2009). Dr. Montalbano has addressed the importance and applicability of the *Harrison* case in his memorandum opposing Defendants' motion for protective order.

Defendants also attempted to distinguish *Laurino v. Syringa General Hospital*, claiming that it was unknown how or why the referenced peer review materials were part of the record. The "how or why" is less important than the fact that Judge Lodge heavily relied on the information in reaching his decision. Clearly, the peer review information was important. No. CIV 98-0439-S-EJL (D. Idaho March 14, 2005) (Order Granting Summary Judgment). In *Miller*

*v. Saint Alphonsus Reg'l Med. Ctr.*, the trial court also relied upon information surrounding the credentialing committee's review of Dr. Miller's qualifications for membership to the medical staff and ultimate determination to deny him privileges at St. Al's. 139 Idaho 825, 87 P.3d 934 (2004). Suspension of privileges and the implication of the peer review statutes were not at issue in *Miller*, but the fact that the court relied on the credentialing information is further proof that disclosure of peer review information is important. As was the case in *Laurino*, how or why the court had the information is less important than the fact that the court relied upon the information in its search for the truth.

Defendants also attempted to distinguish *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), by stating that federal privilege law does not apply. However, Defendants failed to appreciate that the federal court was applying the Illinois medical peer review statutes when it allowed discovery. Defendants would have this Court ignore the analysis and holdings of the federal courts. However, because state courts generally, and Idaho specifically, do not have large bodies of case law on the subject, it makes sense to look to the federal courts for guidance.

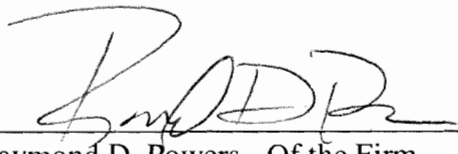
The case law provided by Dr. Montalbano supports his position that the peer review statutes are inapplicable in cases where physicians are challenging operational business-type decisions related to the physician's privileges; therefore, his motion to compel should be granted in full.

### CONCLUSION

Based on the foregoing arguments and those arguments contained in Dr. Montalbano's opposition to Defendants' motion for protective order, Dr. Montalbano respectfully requests that his motion to compel be granted in full.

DATED this 12<sup>th</sup> day of February, 2010.

POWERS TOLMAN, PLLC

By   
Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12<sup>th</sup> day of February, 2010, I caused to be served a true copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF INFORMATION RELATED TO SARMC'S WRONGFUL SUSPENSION OF DR. MONTALBANO'S PRIVILEGES**, by the method indicated below, and addressed to each of the following:

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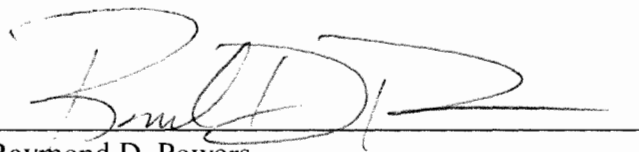
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FILED  
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FEB 12 2010  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS SAINT ALPHONSUS,  
DR. FOX, AND PARKS' REPLY IN  
SUPPORT OF MOTION FOR  
PROTECTIVE ORDER AND MOTION  
TO STRIKE**

**I. INTRODUCTION**

Pending before this Court is Saint Alphonsus Regional Medical Center, Dr. Donald Fox, and Sherry Parks' Motion for Protective Order, which seeks the enforcement of Section 39-1392b of the Idaho Code, and Motion to Strike, which seeks to strike privileged peer review materials from the record. In opposition to these Defendants' motions, Plaintiff Paul J. Montalbano, M.D. has argued: (1) the Idaho Legislature intended only to protect peer review records in the context of medical malpractice actions against physicians; (2) the peer review statutes read as a whole do not apply to a physician's challenge to of the peer review process

**DEFENDANTS SAINT ALPHONSUS, DR. FOX, AND PARKS' REPLY IN SUPPORT OF MOTION FOR  
PROTECTIVE ORDER AND MOTION TO STRIKE - 1**

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itself; and, (3) the Idaho Supreme Court decision in *Harrison v. Binnion* supports disclosure of peer review information.

Of significant note is the decision of this Court on the same cross motions, made by the same attorneys, in *Verska v. Saint Alphonsus Regional Medical Center et al.*, CV OC 0911804 (Order Re: Motion to Compel/Protective Order (J. Bail, February 11, 2010) (“Verska Decision”). Like Dr. Montalbano, Dr. Verska sought discovery of peer review information to support claims arising from the allegedly trained peer review process. In its decision, this Court recognized “the plain language of the Idaho statutes [regarding the peer review privilege] is clear. Idaho law does not contain an exception for physicians seeking discovery to challenge credentialing or reappointment.” (Verska Decision at p. 2.) This Court also recognized the Idaho Supreme Court, in *Harrison v. Binnion*, “did not address a hospital’s liability for making a credentialing/reappointment decision when an action was brought by a physician nor did it address the broader statutory exceptions from the privilege...” (Verska Decision at p. 3.) Finally, this Court noted:

I.C. § 39-1392b unambiguously protects all peer review records from discovery of any type and bars any testimony about those peer review records. Credentialing and privileging decisions are expressly defined as peer review activities. I.C. § 39-1392a(11). The statute is plain and unambiguous and is to be given its plain meaning. There can be no discovery of the peer review records nor can any witness be questioned about any information provided to the peer review committees nor the interpretation or analysis of any evidence submitted as part of this process.

(Verska Decision at p. 5.)

The Verska Decision, and the comments of this Court contained therein, are equally applicable to Dr. Montalbano’s arguments here. As a result, this Court should grant the moving defendants’ Motion for Protective Order.

In addition to noting the Verska Decision, the moving defendants make the following arguments in support the Motions for Protective Order and Motion to Strike.

**A. Idaho's Peer Review Laws are Not "Ambiguous," Nor Does The Application of Those Laws Produce an "Absurd Result."**

While acknowledging that statutes are generally to be applied as they are written, Dr. Montalbano argues that Idaho's peer review laws are either "ambiguous," or that applying the statutes according to their terms would produce an "absurd result."

The Idaho Legislature could not have been more clear or emphatic in the language used in Idaho Code § 39-1392b. Peer review records and related testimony are not discoverable and shall not be used "in any action of any kind in any court . . . for any purpose whatsoever." I.C. § 39-1392b (2009). As recently stated by the Idaho Supreme Court:

A statute is ambiguous when the language is capable of more than one reasonable interpretation. *Porter v. Bd. of Trustees*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). However, a statute may not be deemed ambiguous merely because parties present differing interpretations to the court. *Id.*

*Farber v. Idaho State Ins. Fund*, 208 P.3d 289, 293 (Idaho 2009). Reading the language of section 39-1392b to say that the peer review privilege applies only in "malpractice cases" is not reasonable, and Dr. Montalbano's bare plea for such an interpretation does not create an "ambiguity" where none fairly exists.

Nor does enforcement of the peer review privilege as written produce an "absurd result." Improving the quality of healthcare by promoting both the free flow and use of relevant information is the primary objective of the peer review privilege. I.C. § 39-1392. If the busy doctors who give their time to participate in peer review proceedings or if the persons who provide information in aid of that process are subject to deposition, document discovery, and

eventually suit – like Dr. Fox, who has been sued by Dr. Montalbano for his role in the subject peer review proceedings – participation will evaporate. Peers will not provide critical information, and reviewing doctors will refuse to serve on committees. Peer review “will effectively terminate if [participating doctors] are subject to unlimited discovery processes.” *Yuma Reg’l Med. Ctr. v. Super. Ct.*, 852 P.2d 1256, 1259 (Ariz. Ct. App. 1993).

While Dr. Montalbano alleges a lack of due process, that does not give him license to conduct discovery concerning protected matters. There is nothing remarkable or absurd about this. A litigant can argue that this Court violated his or her rights, but that litigant generally cannot depose Your Honor or the court staff, nor is a litigant entitled to demand discovery of the Court’s notes, drafts or other confidential information except in the most egregious of circumstances. See I.C. § 9-340a(2); I.C.A.R. 32(g)(18) (am. & eff. Feb. 1, 2009). Similarly, a disappointed participant in an arbitration is generally not entitled to depose the arbitrator to substantiate an allegation of bias. *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 430 (9th Cir. 1996) (“Although it may be difficult to prove actual bias without deposing the arbitrators, deposition of arbitrators [is] ‘repeatedly condemned’ by courts.”) (citing *O.R. Sec., Inc. v. Prof’l Planning Assocs., Inc.*, 857 F.2d 742, 748 (11th Cir. 1988)). Parties regularly challenge due process without taking discovery as to why a tribunal did what it did.

Here, the peer review laws are unambiguous. Applying them according to their terms promotes important societal goals and is entirely consistent with the legislation’s legislative history. The tradeoff is that certain matters that would otherwise be discoverable or admissible are not, which, by definition, is the effect of any privilege, including the one created by the Idaho Legislature that governs in this case. “Although it may be inequitable that information contained in privileged materials is available to only one side in a dispute, a determination that

communications or materials are privileged is simply a choice to protect the communication and relationship against claims of competing interests. Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege.” *Admiral Ins. Co. v. U.S. Dist. Ct. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989) (refusing to recognize an “unavailability exception” to the attorney-client privilege) (citing MCCORMICK ON EVIDENCE 171 (3d ed. 1984)).

**B. Dr. Montalbano May Not Waive the Saint Alphonsus’s Peer Review Privilege.**

Dr. Montalbano claims the peer review statutes, read as a whole, allow him to waive the peer review privilege. By doing so, Dr. Montalbano claims the peer review privilege belongs to him, not Saint Alphonsus and the participants in the peer review process. Section 39-1392d of Idaho Code expressly provides: “All peer review records of a health care organization shall be the property of the health care organization concerned which obtains or compiles the same.” (Emphasis added.)

Both the Idaho Code and Saint Alphonsus’s Bylaws provide specific circumstances under which a health care organization may disclose otherwise confidential peer review records. Portions of Title 39 of the Code discuss when a hospital may use or provide such materials to others without waiving the peer review privilege, e.g., I.C. §§ 39-1392d, 39-1392e(f) (when a physician makes a claim against the hospital); the Legislature also knew how to state what a hospital was required to disclose. *See* I.C. § 39-1392e(a) (“In the event of a claim or civil action against a physician . . . any health care organization having information of the kind covered by section 39-1392b, Idaho Code, shall, when interrogated as hereinafter provided, advise any such claimant . . . .”; even then disclosure is limited to certain facts, not peer review records) (emphasis added).



Similarly, Saint Alphonsus's Bylaws state that "[n]othing [in the Bylaws] will prevent limited disclosure" of confidential information "[w]here the Medical Staff Member about whom the information pertains consents . . . ." Article VII, Section 3. The disclosure and use of peer review information is *permissive* in cases such as this, not mandatory.

**C. *Harrison v. Binnion* Does Not Support Dr. Montalbano's Position.**

*Harrison v. Binnion* is inapposite. It is not a case about the peer review privilege, or what discovery is and is not proper under Section 39-1392b, which are the issues presented by the pending motions. Saint Alphonsus disagrees with Dr. Montalbano's reading of *Harrison*, which is a case in which an injured patient was seeking leave to sue Saint Alphonsus for allowing a physician to practice at the hospital, not a challenge to the peer review process itself. *See Harrison*, 214 P.3d at 633-34. The peer review privilege is not even mentioned in *Harrison* (except in the dissent to acknowledge the "confidentiality of peer review materials," *see Harrison*, 214 P.3d at 645 (Horton, J., dissenting in part)), and the decision does not support a common law exception to the statutory privilege against the discovery sought by Dr. Montalbano.

**D. A Protective Order Does Not Achieve the Protections Afforded by the Peer Review Privilege.**

Dr. Montalbano mentions the parties have agreed to a protective order that provides for the sealing of certain confidential materials. The protective order is unrelated to the peer review privilege, and the sealing of the documents is not an alternative to the more substantial protections afforded by the privilege. As a result the stipulation for protective order does not eliminate the need to strike the peer review records contained in the record.

## II. CONCLUSION

Idaho's peer review privilege is found in a direct and plainly worded statute. The purpose of the privilege is to promote the greater good – namely the health and well-being of the citizens of Idaho. The Legislature concluded that this public good trumps the financial interests of individual providers, and to a more limited extent, injured claimants. Defendants Saint Alphonsus Regional Medical Center, Dr. Fox and Sherry Parks are entitled to a protective order implementing Section 39-1392b of the Idaho Code, and request that such an order be entered forthwith.

DATED this 12<sup>th</sup> day of February, 2010.



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Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.

CERTIFICATE OF SERVICE

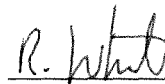
I HEREBY CERTIFY that on the 12<sup>th</sup> day of February, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS SAINT ALPHONSUS, DR. FOX, AND PARKS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION TO STRIKE**, by the method indicated below, and addressed to each of the following:

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Robert B. White  
Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

NO. \_\_\_\_\_ FILED  
A.M. 11:13 P.M. \_\_\_\_\_

FEB 25 2010

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

) Case No.: CV OC 0914805

) ORDER RE: MOTION TO  
) COMPEL/PROTECTIVE ORDER

J. DAVENAVARRO, Clerk  
by *[Signature]* DEPUTY

The plaintiff has moved to compel production of information relating to St. Alphonsus Regional Medical Center's decision to suspend Dr. Montalbano's hospital privileges. He challenges St. Alphonsus assertion of a peer review privilege and statutory immunity. St. Alphonsus has countered with a request for a protective order. In his briefing submitted to the Court, the plaintiff argues vigorously that he needs peer review records in order to advance his claim against the defendants.

The gist of this case is that a hospital employee reported Dr. Montalbano under the St. Alphonsus Conduct Policy as a result of the employee's assertion that he had engaged in disruptive or harassing behavior towards another hospital employee, the clinical coordinator, involving a particular patient, by using argumentative and threatening language to that employee which the complaining party apparently overheard. As a result of the investigation into his conduct, Dr. Montalbano was placed on a probationary suspension. He then filed a complaint himself, a Qstatim, against the employee who had filed the report against him. As a result of this action, he was later subjected to an additional sanction for retaliatory conduct. He asserts that he

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suffered a 149 day suspension of his privileges without a hearing and was wrongfully suspended for a further period of time after he had a hearing for a total suspension period of his privileges for 239 days. He challenges the factual basis for the imposition of any sanctions, the fairness of the procedures followed and certain conduct outside of the Conduct Policy procedures which he contends resulted in the improper disclosure of confidential information. He likens his action to an action for wrongful termination. In his memorandum, he has indicated his desire to depose the individuals who had relevant knowledge about the suspension of his hospital privileges and to obtain peer review records and inquire about the peer review internal process. The motion to compel challenges St. Alphonsus' assertion of immunity under I.C. § 39-1392(c) and the assertion of the privilege against discovery in peer review matters contained in I.C. § 39-1392b to the requests for admission and interrogatories.

The type of information Dr. Montalbano seeks generally fall within these categories:

1. discovery related to the failure to provide Dr. Montalbano any hearing until after his privileges were suspended for 149 days;
2. the internal peer review process including the thought processes of the various members of the committees which evaluated the complaints against him, the thought processes of the people who appointed those committees, the reasons why they weighted some evidence over other evidence and why he was suspended after the hearing,
3. the improper disclosure of confidential information outside of the peer review process.

The specific issue before the Court is whether Idaho law bars discovery into any of these categories of information.

Discovery under the Idaho Rules of Civil Procedure is generally broad. A party may obtain discovery of any matter relevant to the subject matter of the action or the defenses raised

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against the action unless the matter is privileged.<sup>1</sup> I.R.C.P. 26(b)(1). It does not matter if the information sought to be discovered will not be admissible at trial if it appears “reasonably calculated” to lead to admissible information. *Id.* As noted, the Rule does not contemplate discovery of privileged matter regardless of how essential it may be to the underlying action.

A statute may create a privilege to refuse to disclose any matter or to prevent another from being a witness or disclosing any matter or producing any object or writing. Idaho Rule of Evidence 501. The Idaho legislature has created an express privilege with respect to the disclosure of peer review materials. Specifically, I.C. § 39-1392b provides:

**Records confidential and privileged.**

Except as provided in section 39-1392e, Idaho Code, all peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever. No order of censure, suspension or revocation of licensure, or of a certification in the case of emergency medical services personnel, or health care organization privilege of any physician licensed to practice medicine in Idaho shall be admissible in any civil proceeding seeking damages or other civil relief against the physician, emergency medical services personnel, or health care organization which may be a defendant in said cause....(emphasis added).

The statute does not permit the disclosure of information subject to an order making it confidential and free from public scrutiny—the statute by its plain words says that peer review records are not subject to either subpoena or to discovery.

"Peer review" is expressly defined by the Legislature to include:

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<sup>1</sup> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. I.R.C.P. 26(b)(1)

...the collection, interpretation and analysis of data by a health care organization for the purpose of bettering the system of delivery of health care or to improve the provision of health care or to otherwise reduce patient morbidity and mortality and improve the quality of patient care. Peer review activities by a health care organization include, without limitation:

(a) Credentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization;

(b) Quality assurance and improvement, patient safety investigations and analysis, patient adverse outcome reviews, and root-cause analysis and investigation activities by a health care organization; and

(c) Professional review action, meaning an action or recommendation of a health care organization which is taken or made in the conduct of peer review, that is based on the competence or professional conduct of an individual physician or emergency medical services personnel where such conduct adversely affects or could adversely affect the health or welfare of a patient or the physician's privileges, employment or membership in the health care organization or in the case of emergency medical services personnel, the emergency medical services personnel's scope of practice, employment or membership in the health care organization.

I.C. § 39-1392a(11)(emphasis added). A peer review record is defined as “all evidence of interviews, reports, statements, minutes, memoranda, notes, investigative graphs and compilations and the contents thereof, and all physical materials relating to peer review of any health care organization.” I.C. § 39-1392a(12). Credentialing and privileging decisions are expressly included in the definition of “peer review.” Since the disciplinary action taken in this case relates directly to Dr. Montalbano’s privileges to practice at St. Alphonsus, it falls plainly within a legislatively created privilege against the disclosure of any information gathered as a part of the peer review process. Moreover, while the care of the patient with respect to whom the alleged harassment occurred is not directly questioned, the treatment of fellow health care professionals does directly affect the quality of patient care and the system of delivery of health care.

Statutory interpretation is a question of law. *Callies v. O’Neal*, 147 Idaho 841, 216 P.3d 130 (2009) *State v. Anderson*, 145 Idaho 99, 103, 175 P.3d 788, 792 (2008). Statutory interpretation begins with the literal words of the statute which must be given their plain, usual, and ordinary meaning. *Id.*; *State v. Grazian*, 144 Idaho 510, 513, 164 P.3d 790, 793 (2007). If

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the statutory language is unambiguous, “the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction.” *Payette River Property Owners Ass’n v. Board of Comm’rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). If a statute is unambiguous, then there is no resort to statutory construction and the statute’s plain meaning is applied. *Callies v. O’Neal, supra*. 147 Idaho at 847.

In *Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631 (2009), the Idaho Supreme Court held that in a malpractice action brought against physicians and a hospital, the hospital did not have immunity from a cause of action for negligent credentialing. The Court did not address a hospital’s liability for making a credentialing/reappointment decision when the action was brought by a physician nor did it address the broader statutory exceptions from the privilege, i.e., I.C. § 39-1392e. It simply held that I.C. § 39-1392c did not grant immunity for credentialing decisions in a malpractice action brought by a patient. The majority also did not address the prohibition against discovery contained in the privilege granted by I.C. § 39-1392b which unambiguously protects all peer review records from discovery of any type and bars any testimony about those peer review records. Credentialing and privileging decisions are expressly defined as peer review activities. I.C. § 39-1392a(11). The statute is plain and unambiguous and is to be given its plain meaning. There can be no discovery of the peer review records nor can any witness be questioned about any information provided to the peer review committees nor the interpretation nor analysis of any evidence submitted as part of this process. However, the alleged improper disclosure of confidential information to unrelated parties is not part of a peer review activity and is not privileged conduct under Idaho law. Also, the policies and procedures and Bylaws of St. Alphonsus do not fall within the peer review privilege and may be discovered. The policies which relate to the peer review process, how complaints are handled, how they are referred etc., do not fall within peer review activities and are subject to discovery. The policies

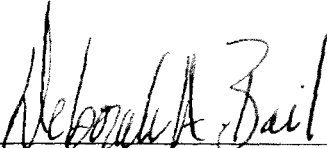
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themselves are not “the collection, interpretation and analysis of data” and the claim of privilege with respect to those policies is overruled.<sup>2</sup> The plaintiff may engage in discovery on all of the allegations of his complaint unless the inquiry or request for documents directly or indirectly involves a peer review record as defined by the statute. Every hospital record does not automatically fall within the peer review privilege. The motion to compel is granted in part and denied in part. St. Alphonsus’ motion for protection of peer review records and testimony about peer review evidence, including interviews, reports, statements, minutes, memoranda notes, compilations and any physical material reviewed in the peer review process and the analysis of that evidence in the peer review process is granted. The motion to strike the peer review materials submitted by Dr. Montalbano is granted.

It is so ordered.

Dated this 23<sup>rd</sup> day of February, 2010

  
Deborah A. Bail  
District Judge

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<sup>2</sup> The Court notes that, although St. Alphonsus raised the peer review privilege with respect to Requests for Admission asking for what the Conduct Policy procedures were when complaints of the type received by Dr. Montalbano were made, it did answer those Requests. The policies themselves do not fall within the privilege.

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CERTIFICATE OF MAILING

I hereby certify that on this 25<sup>th</sup> day of February, 2010, I mailed (served) a true and correct copy of the within instrument to:

ANDREW BRASSEY  
ATTORNEY AT LAW  
PO BOX 1009  
BOISE ID 83701

ROBERT WHITE  
ATTORNEY AT LAW  
PO BOX 2720  
BOISE ID 83701

RAYMOND POWERS  
ATTORNEY AT LAW  
PO BOX 9756  
BOISE ID 83707

J. DAVID NAVARRO  
Clerk of the District Court

By:   
Deputy Court Clerk

000213

ORIGINAL

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A.M. \_\_\_\_\_ P.M. 4:37

MAR 10 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Robert B. White (ISB #4438)  
Givens Pursley LLP  
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Telephone: 208-388-1200  
Facsimile: 208-388-1300  
rbw@givenspursley.com

Attorneys for Defendants Saint Alphonsus Regional Medical Center, Sherry Parks,  
& Donald Fox, M.D.

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS SAINT  
ALPHONSUS'S, DR. FOX'S AND  
PARKS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PERMISSIVE APPEAL**

**I. INTRODUCTION**

In its Order re Motion to Compel/Protective Order dated February 25, 2010 (the "Order"), the Court ruled that Idaho's peer review privilege is to be applied as written, and that the statute precludes the discovery or use of peer review materials "in any action of any kind in any court . . . for any purpose whatsoever." IDAHO CODE ANN. § 39-1392b. Plaintiff now moves

the Court for an order granting them leave to bring a permissive appeal of this ruling to the Idaho Supreme Court under Idaho Appellate Rule 12.

Plaintiff overstates the significance of the ruling given the limited scope of judicial review that is provided by *Miller v. St. Alphonsus Regional Medical Center*, 87 P.3d 934 (Idaho 2004), but regardless, the Court's ruling is sound, and does not present either "a controlling question of law" or one "as to which there are substantial grounds for difference of opinion." The issue is not appropriately appealed in the middle of this case, and defendants Saint Alphonsus Regional Medical Center, Dr. Donald Fox and Sherry Parks respectfully request that the Court deny the motion so that the case can proceed expeditiously to a resolution under the existing case schedule.

## II. OPPOSITION ARGUMENT

The fundamental failing in plaintiff's motion is that application of the peer review privilege to the discovery sought in this case is simply not an issue on which there are substantial grounds for difference of opinion. Whatever the import of the ruling (which, unlike commonplace rulings on issues such as statutes of limitations, does *not* preclude plaintiffs from bringing their claims<sup>1</sup>), the meaning of the peer review privilege statute is not fairly debatable. As stated by the Court, "I.C. § 39-1392b unambiguously protects all peer review records from discovery of any type and bars any testimony about those peer review records." Order at 5.

The peer review privilege has been applied regularly in all sorts of different proceedings, including numerous District Court cases. In the rare instances in which the Idaho appellate courts have had occasion to comment on the privilege, they have affirmed that it precludes the discovery or use of peer review materials. As stated in *Murphy v. Wood*:

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<sup>1</sup> As such, defendants submit that the Court's ruling does not present a "controlling issue of law," which is an independent basis for denying plaintiffs' motion. See *United States v. Woodbury*, 263 F.2d 784 (9th Cir. 1959) (denying application for interlocutory review of ruling on privilege).

In viewing the act as a whole, including this statement of purpose, we believe that the legislature intended to establish a broad privilege for the records and proceedings of hospital medical staff committees. The privilege extends to all discussions and proceedings by hospital staff committees, conducted for the purpose of research, discipline or medical study. Such confidentiality is in the public interest because it encourages a free exchange of medical information that will ultimately benefit the public in the form of improved medical care. We conclude that the Idaho statute was intended to provide broader protections of confidentiality, privilege and immunities than are afforded by mere peer review statutes.

667 P.2d 859, 863 (Idaho Ct. App. 1983). Even *Harrison v. Binnion*, 214 P.3d 631, 635 (Idaho 2009), the case plaintiff cites as somehow impliedly rejecting the privilege, recognizes that “[t]he obvious purpose of the statute is to encourage the free exchange of information and opinions regarding peer review activities, which includes credentialing” by protecting the participants.

The fact that there is no appellate decision expressly rejecting plaintiff’s arguments does not mean they are somehow meritorious; rather, the absence of reported case law in the 37 years since the peer review privilege was first codified instead reflects that the language used by the legislature is so direct that the issue is never litigated. And, in any event, it is axiomatic that “just because a court is the first to rule on a particular question . . . does not mean that there is such a substantial difference of opinion as will support an interlocutory appeal.” 4 AM. JUR. 2D, Appellate Review § 123 (2010) (footnotes omitted).

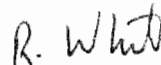
At this juncture, a permissive appeal will do nothing more than delay this matter for many months, if not longer. The issue under *Miller* is whether Dr. Montalbano received due process, not whether the decision concerning Dr. Montalbano’s privileges was subjectively “correct.” If, as plaintiff suggests, “it will be impossible for Dr. Montalbano to prove his claims against the Defendants” without the barred discovery, Motion at 5, then they are claims that should not have been filed in the first place. The defendants – who have been wrongfully

accused of all sorts of wrongdoing – are anxious to clear their names and bring this matter to a conclusion, and do not want further delay.

### III. CONCLUSION

Idaho's peer review privilege is found in a direct and unambiguous statute. The application of such a statute does not present a suitable case for a permissive appeal under I.A.R. 12. As stated in *Budell v. Todd*, 665 P.2d 701, 703 (1983), "[T]he Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification." This is not such an exceptional case, and defendants request that the case proceed on the merits.

DATED this 10th day of March, 2010.



---

Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10<sup>th</sup> day of March, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS SAINT ALPHONSUS'S, DR. FOX'S AND PARKS' OPPOSITION TO PLAINTIFF'S MOTION FOR PERMISSIVE APPEAL**, by the method indicated below, and addressed to each of the following:

Raymond D. Powers  
Powers Tolman, PLLC  
345 Bobwhite Court, Ste #150  
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Bradley S. Richardson  
Brassey, Wetherell & Crawford, LLP  
203 W. Main Street  
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Boise, ID 83701-1009  
*Attorneys for Christian G. Zimmerman, M.D.*

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☐ Electronic Mail

*R. White*

Robert B. White

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MAR 18 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

Attorneys for Christian G. Zimmerman, M.D.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805

**JOINDER IN DEFENDANTS SAINT  
ALPHONSUS'S, DR. FOX'S AND  
PARKS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PERMISSIVE APPEAL**

COMES NOW the above-captioned Defendant Christian G. Zimmerman, M.D., by and through his counsel of record, Brassey, Wetherell & Crawford, LLP, and hereby joins, and gives notice of his Joinder in Defendants Saint Alphonsus, Dr. Fox and Dr. Parks' Opposition to Plaintiff's Motion for Permissive Appeal.

For the reasons and grounds set forth in Co-Defendants' Opposition, and the corresponding statutes, rules and case authorities cited therein, the Court should deny Plaintiff's Motion for Permissive Appeal.



DATED this 16<sup>th</sup> day of March, 2010.

BRASSEY, WETHERELL & CRAWFORD, LLP

By Andrew C. Brassey, For  
Andrew C. Brassey, Of the Firm  
Attorneys for Christian G. Zimmerman, M.D.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of March, 2010, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Raymond Powers  
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Andrew C. Brassey, For  
Andrew C. Brassey

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MAR 24 2010

J. DAVID NAVARRO, Clerk  
By [Signature] DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants.

Case No. CV OC 0914805


**ORDER GRANTING PLAINTIFF'S  
MOTION FOR PERMISSIVE  
APPEAL**

**THIS MATTER** having come before the Court for hearing on the 17th day of March, 2010, upon the Plaintiff's Motion for Permissive Appeal, and after considering the memoranda filed by the parties, having heard oral argument and the Court being fully advised in the premises,

**IT IS HEREBY ORDERED** that Plaintiff's Motion for Permissive Appeal, pursuant to Rule 12, I.A.R., is granted, allowing Plaintiff to pursue interlocutory appeal of this Court's February 25, 2010 decision, which denied Plaintiff's "Motion to Compel Production of Information Relevant to St. Alphonsus Regional Medical Center's Wrongful Suspension of Dr. Montalbano's Privileges."

000221

ORDERED this 23<sup>rd</sup> day of March, 2010.

By   
DEBORAH A. BAIL  
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24<sup>th</sup> day of March, 2010, I caused to be served a true copy of the foregoing **ORDER GRANTING PLAINTIFF'S MOTION FOR PERMISSIVE APPEAL**, by the method indicated below, and addressed to each of the following:

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*Attorneys for Plaintiff*


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☐ Overnight Mail  
☐ Telecopy

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Donald Fox, M.D.*

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☐ Overnight Mail  
☐ Telecopy

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Zimmerman, M.D.*

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☐ Telecopy

  
Deputy Clerk of the Court

000222

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Telephone: (208) 577-5100  
Facsimile: (208) 577-5101  
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J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff/Appellant,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.; and  
DONALD FOX, M.D.,

Defendants/Respondents.

Case No. CV OC 0914805

**NOTICE OF APPEAL**

**Category: L**

**Fees: \$101.00**

**TO: THE ABOVE-NAMED DEFENDANTS/RESPONDENTS SAINT ALPHONSUS REGIONAL MEDICAL CENTER, SHERRY PARKS, CHRISTIAN G. ZIMMERMAN, M.D., AND DONALD FOX, M.D., THEIR ATTORNEYS, ROBERT B. WHITE OF GIVENS PURSLEY, LLP, 601 W. BANNOCK STREET, BOISE, ID 83702, AND ANDREW C. BRASSEY OF BRASSEY, WETHERELL & CRAWFORD, LLP, 203 W. MAIN STREET, BOISE, ID 83702, AND THE CLERK OF THE ABOVE-ENTITLED COURT.**

000223

NOTICE IS HEREBY GIVEN, pursuant to Rule 17, of the Idaho Appellate Rules, that:

1. The above-named appellant, PAUL J. MONTALBANO, M.D. appeals against the above-named respondents to the Idaho Supreme Court from the:

a. Order Re: Motion to Compel/Protective Order entered February 25, 2010, by the Honorable Deborah A. Bail.

2. The appellant has the right to appeal to the Idaho Supreme Court pursuant to Rule 12(a), I.A.R., and as set forth in the Idaho Supreme Court's Order Granting Motion for Permissive Appeal, entered on May 17, 2010.

3. The following is a preliminary statement of the issues which appellant intends to assert on appeal. This list of issues shall not prevent the appellant from asserting other issues on appeal:

a. Whether Idaho Code § 39-1392b can be expanded beyond its wording to prevent a physician from discovering information, pursuant to Rules 30, 33, 34, and 36, Idaho R. Civ. P, related to a healthcare organization's credentialing/privileging decisions to 1) indefinitely suspend the physician's medical staff privileges without a fair hearing and 2) suspend the physician's medical staff privileges when the decision was based on a false report, where it is the physician who is seeking the information to challenge the organization's decisions.

b. Whether Idaho Code § 39-1392c can be expanded beyond its wording to grant a healthcare organization immunity from liability for a credentialing/privileging decision to 1) indefinitely suspend the physician's medical staff privileges without a fair hearing and 2) suspend the physician's medical staff privileges when the decision was based on a false report when it is the physician who is challenging the organization's decision.

4. A protective order was entered on February 5, 2010, to protect sensitive information designated as confidential by the party seeking the protection.

5. Appellant requests that the reporter prepare a partial transcript, pursuant to Rule 25(b), I.A.R., to include only the hearing on appellant's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges held on February 17, 2010.

6. Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28(b)(1), I.A.R.:

a. Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges filed January 20, 2010;

b. Memorandum in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges filed January 20, 2010;

c. Affidavit of Raymond D. Powers in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges filed February 9, 2010;

d. Appendix in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges filed January 20, 2010;

e. Reply in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges filed February 12, 2010.

f. Protective Order with a copy of the Stipulation for Entry of Protective Order attached, filed February 5, 2010; and

g. Order Re: Motion to Compel/Protective Order, entered February 25, 2010.

000225

7. The undersigned hereby certifies:

- a. That a copy of this Notice of Appeal has been served on the reporter;
- b. That appellant has paid the estimated fee of \$113.75 to Susan Gambee, Court Reporter, for preparation of the reporter's transcript;
- c. That the estimated fee for the clerk's record is \$100.00 and has been paid in addition to the filing fee of \$101.00 to Ada County Clerk of the Court; and
- d. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 4 day of June, 2010.

POWERS TOLMAN, PLLC

By Raymond D. Powers  
Raymond D. Powers - Of the Firm  
Portia L. Rauer - Of the Firm  
Attorneys for Plaintiff/Appellant

000226

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of June, 2010, I caused to be served a true copy of the foregoing **NOTICE OF APPEAL**, by the method indicated below, and addressed to each of the following:

Robert B. White  
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601 W. Bannock Street  
PO Box 2720

Boise, ID 83701-2720

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*Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks and  
Donald Fox, M.D.*

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\_\_\_ Hand Delivered  
\_\_\_ Overnight Mail  
☒ Telecopy

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Fax: 344-7077

*Attorneys for Defendant Christian G.  
Zimmerman, M.D.*

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\_\_\_ Hand Delivered  
\_\_\_ Overnight Mail  
☒ Telecopy



Raymond D. Powers

Portia L. Rauer

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JUN 18 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Robert B. White (ISB #4438)  
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Telephone: 208-388-1200  
Facsimile: 208-388-1300  
rbw@givenspursley.com

Attorneys for Defendants Saint Alphonsus Regional Medical Center,  
Sherry Parks, and Donald Fox, M.D.

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.

Plaintiff,

v.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants.

No. CV OC 0914805

**DEFENDANTS' REQUEST FOR  
ADDITIONAL RECORDS TO BE  
INCLUDED IN THE CLERK'S  
RECORD ON APPEAL AND/OR  
TRANSCRIPT ON APPEAL**

TO: THE ABOVE NAMED APPELLANT/PLAINTIFF AND HIS ATTORNEY OF  
RECORD, RAYMOND D. POWERS, COURT REPORTER SUSAN GAMBEE AND THE  
CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN, that Defendants/Respondents Saint Alphonsus Regional  
Medical Center, Sherry Parks and Donald Fox, M.D., in the above entitled proceeding hereby  
request, pursuant to Rule 19 of the Idaho Appellate Rules, the inclusion of the following material  
in the Clerk's Record in addition to that required to be included by the Idaho Appellate Rules  
and the Notice of Appeal:

**DEFENDANTS' REQUEST FOR ADDITIONAL RECORDS TO BE INCLUDED IN THE  
CLERK'S RECORD ON APPEAL AND/OR TRANSCRIPT ON APPEAL - 1**

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A. Clerk's Record:

1. Defendant Saint Alphonsus's, Dr. Fox's and Parks' Motion for Protective Order and Motion to Strike filed on 02/03/10.
2. Defendant Saint Alphonsus's, Dr. Fox's and Parks' Memorandum in Support of Motion for Protective Order and Motion to Strike filed on 02/03/10.
3. Defendant Saint Alphonsus's, Dr. Fox's and Parks' Memorandum in Opposition to Plaintiff's Motion to Compel filed on 2/10/10.
4. Defendant Saint Alphonsus's, Dr. Fox's and Park's Reply in Support of Motion for Protection Order and Motion to Strike filed on 2/12/10.
5. Defendant Saint Alphonsus's, Dr. Fox's and Park's Opposition to Motion for Permissive Appeal filed on 3/10/10.
6. Dr. Zimmerman's Joinder in Opposition to Motion for Permissive Appeal filed on 3/16/10.
7. Order Granting Plaintiff's Motion for Permissive Appeal lodged on 3/24/10.

B. Reporter's Transcripts:

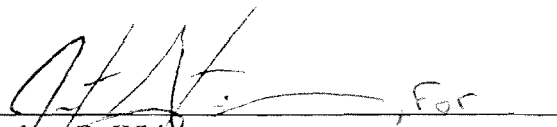
1. Hearing transcript for Motion for Protective Order and Motion to Strike hearing held on 2/17/10.
2. Hearing transcript for Motion for Permissive Appeal hearing held on 3/17/10.

I certify that a copy of this request for additional transcripts has been served on the court reporter, Susan Gambee at 200 W. Front Street, Boise, Idaho, of who a transcript is requested and that the estimated number of additional pages being requested is 26 pages.

I certify that a copy of this request for additional records has been served upon the Clerk

of the District Court and upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 18<sup>th</sup> day of June, 2010.



Robert B. White  
GIVENS PURSLEY LLP  
Attorneys for Defendants Saint Alphonsus  
Regional Medical Center, Sherry Parks, and  
Donald Fox, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18<sup>th</sup> day of June, 2010, I caused to be served a true copy of the foregoing **DEFENDANTS' REQUEST FOR ADDITIONAL RECORDS TO BE INCLUDED IN THE CLERK'S RECORD ON APPEAL AND/OR TRANSCRIPT ON APPEAL**, by the method indicated below, and addressed to each of the following:

Raymond D. Powers  
Powers Tolman, PLLC  
345 Bobwhite Court, Ste #150  
P.O. Box 9756  
Boise, ID 83707

*Attorneys for Paul Montalbano, M.D.*

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Facsimile (208) 577-5101

Andrew C. Brassey  
Bradley S. Richardson  
Brassey, Wetherell & Crawford, LLP  
203 W. Main Street  
PO Box 1009  
Boise, ID 83701-1009

*Attorneys for Christian G. Zimmerman, M.D.*

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Facsimile (208) 344-7077

  
\_\_\_\_\_  
Robert B. White

TO: Clerk of the Court  
Idaho Supreme Court  
451 West State Street  
Boise, Idaho 83720  
(208) 334-2616

NO. \_\_\_\_\_  
FILED  
A.M. **8:00** P.M. \_\_\_\_\_  
AUG 16 2009  
J. DAVID NAVARRO, Clerk  
By BRADLEY J. THIES  
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO


- - - - - x Docket No. 37573-2010  
:  
PAUL J. MONTALBANO, M.D., :  
:  
Plaintiff-Appellant, :  
:  
vs. :  
:  
SAINT ALPHONSUS REGIONAL MEDICAL :  
CENTER, :  
:  
Defendants-Respondents. :  
:  
- - - - - x

NOTICE OF TRANSCRIPT OF 59 PAGES LODGED

Appealed from the District Court of the  
FOURTH Judicial District of the State of  
Idaho, in and for the County of ADA,  
Deborah A. Bail, District Court Judge.

This transcript contains hearing held on:  
2/17/10 & 3/17/10

DATE: June 22, 2010

  
\_\_\_\_\_  
Susan G. Gambee, Official Court Reporter  
Official Court Reporter,  
Judge Deborah Bail  
Ada County Courthouse  
Idaho Certified Shorthand Reporter No. 18  
Registered Merit Reporter

00232

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff-Appellant,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants-Respondents.

Supreme Court Case No. 37573

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as  
CONFIDENTIAL EXHIBITS to the Record:

1. Affidavit of Raymond D. Powers in Support of Plaintiff's Motion to Compel Production of Information Related to SARMC's Wrongful Suspension of Dr. Montalbano's Privileges, filed February 9, 2010.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 5th day of August, 2010.

J. DAVID NAVARRO  
Clerk of the District Court

By BRADLEY J. THIES  
Deputy Clerk

CERTIFICATE OF EXHIBITS

00233

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff-Appellant,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants-Respondents.

Supreme Court Case No. 37573

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have  
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of  
the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

RAYMOND D. POWERS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ROBERT B. WHITE

ATTORNEY FOR RESPONDENTS

BOISE, IDAHO

J. DAVID NAVARRO  
Clerk of the District Court

Date of Service: AUG 17 2010

By BRADLEY J. TIBBETTS  
Deputy Clerk

CERTIFICATE OF SERVICE

00234

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAUL J. MONTALBANO, M.D.,

Plaintiff-Appellant,

vs.

SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER; SHERRY PARKS;  
CHRISTIAN G. ZIMMERMAN, M.D.;  
and DONALD FOX, M.D.,

Defendants-Respondents.

Supreme Court Case No. 37573

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 4th day of June, 2010.

J. DAVID NAVARRO  
Clerk of the District Court

By BRADLEY J. THIES  
Deputy Clerk

CERTIFICATE TO RECORD

00235